Petition

81-1399

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No. ...

IN THE

Supreme Court of the United States

October Term, 1981

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

IRA REINER, City Attorney,
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power,
DAVID J. OLIPHANT, Deputy City Attorney,
By DAVID J. OLIPHANT,
Deputy City Attorney,
111 North Hope Street, P.O. Box 111,
Los Angeles, Calif. 90051,
(213) 481-6378,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Is an award of attorneys' fees improper under the special circumstances of this Title VII case, where the public employer defendant had no choice but to litigate the legal issues and was held correct by this Court to have done so?

2. Does Title VII require that the trial judge set forth findings of fact to explain why a fee was granted and how the amount of the fee was determined?

3. Is the amount of fees awarded excessive under the special circumstances of this case where the plaintiffs won only a doctrinal change in the law on a moot issue, but no tangible benefits, the public employer won all other issues, and the amount apparently included compensation for all hours spent on the case at the highest hourly rate requested?

4. Is it improper to award a "multiplier" under the Title VII provisions allowing "reasonable" attorneys' fees to the prevailing party, particularly where the attorneys took no risk in taking the case but were compensated throughout the litigation?

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on August 7, 1981, with dissenting opinion filed by the Honorable Judge

John F. Kilkenny, as to which rehearing was denied on November 16, 1981. That decision affirmed the judgment of the District Court for the Central District of California entered on remand from the Court of Appeals after reversal of a prior decision of the District Court in accordance with this Honorable Court's judgment at *Los Angeles Department of Water and Power, et al. v. Marie Manhart, et al.*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed. 2d 657 (1978).[1]

In the earlier decision, *Manhart* 387 F.Supp. 980 (1975), the District Court had issued a preliminary injunction against petitioner Department[2] requiring female employees of the Los Angeles Department of Water and Power to make higher monthly contributions to its retirement plan than male employees (a practice discontinued *before* issuance of the injunction in response to a change in California State Law) and had awarded the female employees retroactive refunds of contributions. The back pay award was reversed by the Court of Appeals pursuant to the above judgment of this Honorable Court which held that in making such award the District Court had erred in failing to consider the equitable nature of Title VII. On remand, the District Court entered a final judgment, excluding the back pay award, which (1) granted plaintiffs a permanent injunction (2) dismissed with prejudice all other causes of action alleged by the respondents under federal and state law, and (3) awarded the respondents attorneys' fees in the amount of $165,000. The Department appealed from the judgment, and the Court of Appeals affirmed, superimposing additional attorneys' fees for the time spent on the appeal.

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[1]Hereinafter, the various court opinions involving this case are cited as *Manhart* followed by the appropriate citation: *e.g. Manhart*, 435 U.S. 702, ___ .

[2]The petitioners include the Department of Water and Power, the Board of Water and Power Commissioners, and the Board of Administration of the Water and Power Employees Retirement Plan but will be referred to collectively as the "Department" or petitioners.

This petition for review concerns itself with the award of attorneys' fees, which petitioners submit again fails to consider the equitable nature of Title VII.

Citations to Opinions Below.

No findings or opinion were issued by the District Court for the Central District of California on the fee award, although requested. A copy of the judgment is printed as Appendix A. The opinion of the United States Court of Appeals for the Ninth Circuit, affirming the judgment, *Manhart*, 652 F.2d 904 (1981), is printed as Appendix B. The denial of rehearing is printed as Appendix C.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 7, 1981. Petitioners' timely petition for rehearing was denied on November 16, 1981.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes and Rules Involved.

Involved herein is Section 703(k) of Title VII of the Civil Rights Act of 1964, as amended in 1972 (the Equal Employment Opportunity Act of 1972), 42 U.S.C. 2000e-2(k), the text of which is printed in Appendix D hereto. The Charter of the City of Los Angeles, a state law, § 220.1(1)(a)(g) is printed as Appendix E hereto. Section 7500 of the California Government Code is printed as Appendix F hereto.

Statement of the Case.

This case was filed as a class action, alleging causes of action under Title VII of the Civil Rights Act as amended in 1972 (42 U.S.C. § 2000e-2, hereinafter "Title VII"), the Civil Rights Act of 1871 (42 U.S.C. § 1983), the Fourteenth Amendment to the United States Constitution, and Article I, Sections 1 and 21 of the California Constitution.

The plaintiff class consisted of active and retired female employees of the City of Los Angeles Department of Water and Power (hereinafter the "Department") who were required until January 1, 1975, to pay a higher retirement plan contribution than their male "counterparts"[1] in order to fund their longer actuarial life expectancies and consequent greater expectancy of benefits. As a concomitant, the Department had likewise provided greater funding for such female employees than for males. The longer life expectancy of females over males, which is virtually universally true, was conceded for all material purposes in the case.

The lawsuit was actually brought by the International Brotherhood of Electrical Workers, Local Union No. 18 (hereinafter "IBEW"), the named plaintiffs and the Committee to Protect Women's Retirement Benefits. IBEW was involved in a representational contest with another union, the American Federation of State, County and Municipal Employees (hereinafter "AFSCME") and pressed the lawsuit to gain support. (See Appendix H, for example.)

The defendants were the Department, the Board of Administration of the Water and Power Employees Retirement Plan members of the Board of Water and Power Commissioners, and certain individual officers of the Department and members of the Board of Administration.

The action, filed in 1973, sought an injunction against the differentiation in contribution levels and retroactive refunds of contributions.

Plaintiffs contended that the difference in contribution levels discriminated against them in violation of Title VII, the Civil Rights Act of 1871 and the Equal Protection provisions of the United States and California Constitutions.

Shortly after the action was filed, on the Department's motion, the District Court dismissed certain of the non-Title

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[1]Counterparts refers to male persons of the same age, date of hire, and length of service.

VII causes of action. The plaintiffs later appealed from that dismissal and their appeal was dismissed as untimely. *Manhart*, 553 F.2d 581, 586 (1976). Ultimately, all the non-Title VII causes were dismissed.

At the same time the written Complaint was filed, your petitioners were likewise faced with claims by male employees that the Retirement Plan discriminated against them. The basis of the claim was that the Plan had collected greater retirement contributions from *male* employees during their term of active employment while paying greater pension benefits to *female* employees. (See Appendix G hereto, Notice of Charge of Employment Discrimination filed by male employees with the Equal Opportunity Commission in 1972, final paragraph.[4]) The claim made the Department aware that there was potential litigation from male employees, also.

In 1974, the plaintiffs moved for preliminary injunction to require monthly contribution levels to be "equalized". The Department opposed the motion in the good faith belief that (a) it was contrary to the legal requirement of maintaining an actuarially sound plan (See Appendix E, Section 220.1(1)(a)(g), of the City Charter), and (b) such equalization would have a disparate impact upon male employees by requiring them to subsidize the longer life expectancy of females, or to receive less total pay than females (if the Department paid the additional funding necessary) in violation of the Equal Pay Act (29 U.S.C. § 206(d)).

In late 1974, Government Code Section 7500, supported by AFSCME, was adopted by the California Legislature. This Section required that (effective January 1, 1975) monthly contribution rates in the Department's Retirement Plan be identical for males and females (Appendix F). In

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[4]We do not know the basis for those claims but it may have been that from an actuarial standpoint some men felt the total level of funding and benefits favored women. See footnote 7.

obedience to that law, petitioners amended the Retirement Plan to equalize the contribution levels, commencing January 1, 1975. Thereafter, on January 15, 1975, the District Court issued a preliminary injunction ordering that the rates be equalized, although that had already been accomplished (*Manhart*, 387 F.Supp. 980, 984 fn.1). Subsequently, the District Court granted plaintiffs' motion for summary judgment, entered a permanent injunction under Title VII and awarded the plaintiffs back pay in the form of a retroactive refund of prior contributions.

The Department appealed from the judgment of the District Court. Having already changed the Plan to "equalize"[5] monthly contribution rates, the main concern was the retroactive refund. However, the award of refunds was so inextricably interwoven with the order to equalize, that petitioners attacked the basis for the award by attacking the entire judgment. Moreover, petitioners felt they had no choice but to appeal and attack the entire judgment. Faced already with discrimination claims by males before the Plan change, there was the distinct possibility that lawsuits from men would be forthcoming and that other courts might ultimately hold that the equalization of monthly contributions in fact discriminated against males.

Moreover, similar cases were before the courts (*e.g. Henderson v. Oregon*, 405 F.Supp. 127 (D.Ore. 1976); *Diana Spirit v. TIAA-CREF*, 475 F.Supp. 1298 (S.D.N.Y. 1979), which might have reached the opposite conclusion to the Court in this case. If petitioners paid out refunds to end the lawsuit which such cases later held were not necessary, petitioners might be in violation of their fiduciary responsibility to both male and female employees, as pension trustees.

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[5]Petitioners use the term "equalize" herein to mean charging the identical monthly rate to the male and female employees although the Department continued to pay more into the Retirement Plan for females in order to maintain an actuarially sound system.

The plaintiffs then also appealed challenging the earlier dismissal of their other causes of action by the District Court.

The Court of Appeals, in a divided opinion, affirmed the District Court's judgment on the Title VII issue. *Manhart*, 553 F.2d 581 (1976)

This Honorable Court (*Manhart*, 435 U.S. 702 [1978]) vacated the judgment of the Court of Appeals, and remanded the matter after determining that the practice of differential contributions was violative of Title VII but that the equitable nature of Title VII required that such holding be applied prospectively only and that it was error to award back pay. Subsequently, the Court of Appeals reversed the District Court in accordance with the Supreme Court opinion, affirmed the issuance of the injunction but reversed the back pay award.

Following remand to the District Court, the plaintiffs moved for attorneys' fees, the union lawyers seeking $182,568.75 and the individual plaintiffs' lawyer, Ms. Katherine Stoll Burns, seeking $30,292.50.

The Department opposed the fee motion, taking the position that the plaintiffs were not prevailing parties since they had won no practical advantage, the injunction being issued at a time when it was moot, *after* the Department had changed the retirement plan in response to state law and the Department having won the back pay and non-Title VII issues. Petitioners also contested the amount of the fee claimed, taking the position that the amount sought was excessive. The union lawyers claimed their fees as follows:

Partners' Hourly Fees	
(360¼ hours at $100.00/hour)	$36.025.00
Senior Associates' Fees	
(613 hours at $80.00/hour)	49,040.00

Junior Associates' Fees	
(265¾ hours at $55.00/hour)	14,616.00
Law Clerks ($25.00/hour)	4,644.00
SUBTOTAL	$104,325.00

They added a 1.75 "multiplier" to arrive at the final fee requested, $182,568.75.

Though asking the above rates, the union attorneys had actually charged IBEW an hourly rate for partners that only ran from $60 to $75 per hour, associates from $40 to $70 per hour and law clerks from $10 to $20 per hour during the litigation, for a total of $68,776.25. Those fees had been paid by IBEW in a timely fashion in response to monthly billings by the union counsel throughout the litigation. Moreover, those fees were in the high range of fees charged as compared to various other union clients represented by IBEW counsel. IBEW counsel made no claim, and there was no evidence, that they were acting in any capacity, *pro bono publico* or otherwise, other than as a commercially hired counsel paid at the going-rate by their union client. IBEW, as noted, was pursuing the litigation for the purpose of winning a representational battle. (Appendix H is a copy of material published by the union relative to the campaign.)

Ms. Burns claimed 215 hours at $80 per hour and two hours at $55 per hour for a total of $17,310.00 to which she added a 1.75 multiplier to arrive at a grand total of $30,292.50. Ms. Burns maintained no time records showing how her time was spent. Unlike IBEW counsel, she was not compensated during the trial, having advised her clients that she intended to look to the court for fees. However, hers was not the laboring oar in the lawsuit.

Of the total time claimed by both attorneys, less than ten hours was spent in actual court time in all appearances, including the fee matter.

Affidavits were offered in support of and against the fee award. Some additional testimony was taken.

The District Court ruled from the bench that attorneys for the union were awarded $135,000 and Ms. Burns $30,000. The Court dismissed all other causes of action with prejudice. (See Appendix A.)

The only support for the award on the record is the statement that the court made from the bench:

> "In fixing those fees, I, of course, am taking into account the reasonable time spent by the attorneys, the complexity of the issues, the skill and experience of the attorneys, the results obtained, and the need to adequately compensate lawyers who take on Title VII cases.
>
> "I have not sat down with a calculator and gone over each hour, and made a determination on an hour-by-hour or minute-by-minute basis applying to that time a reasonable hourly rate.
>
> "I think that approach, which is mechanical, can lead in some cases, to an unfair conclusion."

The court then awarded the attorneys $165,000.

Although requested to do so, the trial court refused to make findings of fact as to how many hours or what hourly rate it was allowing the plaintiffs' counsel, or indeed, how it calculated the fee.

The Department appealed on the basis that the plaintiffs were not prevailing parties, having obtained nothing but a moot injunction, but to the extent that they could be viewed as prevailing parties special circumstances were present for the denial of fees in this case. Petitioners also contended that the amount of the fees awarded was excessive under the circumstances of this case and that findings of fact should have been made to establish for the reviewing courts how the lower court determined the fee.

POINT ONE

BOTH UNDER THE LAW OF THE CASE AS ESTABLISHED BY THE SUPREME COURT AND UNDER THE FACTS SPECIAL CIRCUMSTANCES ARE PRESENT FOR THE DENIAL OF ATTORNEYS' FEES.

Ordinarily, the prevailing parties should recover attorneys' fees unless special circumstances would render such an award unjust. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975). This Court has already identified that special circumstances are present in holding that the Department was not to be subject to a back pay award and hence was correct, as a fiduciary, to pursue the lawsuit. An award of attorneys' fees is therefore unjust for the following reasons: it is contrary to the law of the case; the plaintiffs are not prevailing parties within the meaning of Title VII; and the Department had no choice but to carry the litigation forward.

(a) Law of the Case.

It is the law of this case that the District Court must give attention to the equitable nature of Title VII remedies. *Manhart*, 435 U.S. 702, 719. It was the previous failure of the District Court to do so that led this Honorable Court to hold that the award of retroactive monetary relief was improper. Another of the Title VII remedies is the award of attorneys' fees. In dealing with attorneys' fees, the District Court has again failed to give attention to the equitable nature of Title VII.

The holding of this Court denying back pay in the parent case plainly indicated that the Department was correct in carrying this matter forward. The award of fees, however, punishes the Department for so doing. It makes the retroactive pay hostage for the attorneys' fees. Put another way, the Department could have avoided paying the major portion of attorneys' fees by paying the back pay when the District Court first issued its order. The Department elected to pro-

ceed with the lawsuit to protect the pension fund, which it succeeded in doing. A fee award deprives the Department of the benefit of that correct course of action. The same equitable principles which precluded an award of back pay should therefore preclude an award of attorneys' fees under these special circumstances.

(b) Plaintiffs Were Not Prevailing Parties.

Here, attorneys' fees should not be awarded because the plaintiffs were not prevailing parties in the absence of special circumstances.

The decision in *Manhart* (435 U.S. 702) was to apply what amounted to a change in the law, prospectively. Thus, this Court stated:

> "There can be no doubt that the prohibition against sex-differentiated employee contributions represents a marked departure from past practice. Although Title VII was enacted in 1964, this is apparently the first litigation challenging contribution differences based on valid actuarial tables. . . . Without qualifying the force of the Albermarle presumption in favor of retroactive relief, we conclude that it was error to grant such relief in this case." *Manhart*, 435 U.S. 702, 722-723.

This Court held that Title VII was not intended to revolutionize the insurance and pension industries (*Manhart*, 435 U.S. 702, 717) and for that reason refused to apply the law retroactively, since to have done so would have created chaos in those industries. It would of course be inconsistent with that determination to hold that the Department was in violation at a time when the rest of the industry was not. Thus, the holding of the Court was prospective.

A prevailing party is one who obtains some practical benefit for himself. It does not have to be money but it must be some practical benefit.

Thus, in the cases cited by the Court of Appeals (*Manhart*, 652 F.2d 904, 907) for the proposition that plaintiffs

were prevailing parties, *Williams v. Alioto*, 625 F.2d 845, 847 (9th Cir. 1980); *Sethy v. Alameda County Water District*, 602 F.2d 894, 897-898 (9th Cir. 1980) and *Rosenfeld v. Southern Pacific Co.*, 519 F.2d 527, 529 (9th Cir. 1972), injunctive relief was granted which gained for those particular plaintiffs a practical benefit. In *Alioto*, an unlawful "stop and frisk" search policy was stopped. In *Sethy*, the plaintiff was ordered reinstated with back pay. In *Rosenfeld*, the defendant was ordered to consider the plaintiff for any job on an equal basis with others (293 F.Supp. 1219 [C.D. Cal. 1968], aff'd 444 F.2d 1219 [9th Cir. 1971]). Each of those orders produced a tangible benefit which plaintiff had not previously enjoyed, was not otherwise entitled to and for which the lawsuit was the procuring factor. In contrast, in the present case, the injunction issued by the District Court provided no practical benefit. The Department had previously equalized its monthly contribution rate in accordance with state law as this Court recognized (*Manhart*, 435 U.S. 706. See also 387 F.Supp. 980, 984 fn. 1). The requirement of the California Government Code (section 7500) precluded the need for injunction. Its issuance was moot. (*cf. Rosen v. Electric and Gas Co.*, 328 F.Supp. 454, 457 (D.N.J. 1971), rev'd 477 F.2d 90 (3rd Cir. 1973).) Compliance was therefore not brought about by this lawsuit but by the change in state law.

Affording to states the opportunity to resolve discrimination at the local level is a policy cornerstone of Civil Rights Act of 1964 (See for example 42 U.S.C. § 2000e-5(c) and (d); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63-64 (1980)). Therefore, this granting of fees to obtain an injunction where state law has already secured compliance, is we submit in derogation of the express intent of Congress. The District Court should have dismissed or denied the application for permanent injunction as moot.

Where a plaintiff was not entitled to any relief at the time the suit was brought, she is not a "prevailing party" under

Title VII, even though she may prove she was in fact discriminated against. *Harrington v. Vandalia-Butler Board of Education*, 585 F.2d 192 (6th Cir. 1978). (Accord: *Inmates of Nebraska, etc. v. Greenholtz*, 567 F.2d 1381, 1384 (8th Cir. 1977) and at 436 F.Supp. 432, 443 (1976).) The prospective application of the change in the rule of law, under this case, would, therefore, preclude plaintiff from being a prevailing party. Moreover, under the rationale of *Harrington*, it was not until the District Court injunction was issued on January 15, 1975 *after* the change of Government Code Section 7500, that plaintiffs herein were entitled to any relief by this action.

Certainly, it is clear that from the plaintiffs' standpoint, once the retirement plan had been changed to remove the challenged practice, the sole reason for continuing to press the litigation, was the recovery of retroactive relief in the form of back pay. The plaintiffs' position was that this practice had *always* been illegal under Title VII, the Civil Rights Act of 1871, the Fourteenth Amendment, and Article 1, Sections 1 and 21 of the California Constitution, and therefore they were entitled to back pay. But this argument was rejected by all the Courts.

Therefore, the plaintiffs were not prevailing parties on the issue of retroactive relief and on the other statutory causes under *any* theory. Notwithstanding this, the lower Courts still awarded fees for the time spent on these matters as though the plaintiffs had prevailed. In dealing with the obvious paradox that plaintiffs did not prevail on these issues and yet were awarded fees, the Court of Appeals cited the case of *Sethy v. Alameda County Water District*, 602 F.2d 894, 897-898 (9th Cir. 1980) for the proposition that the plaintiffs having prevailed on one issue were entitled to fees for *all* the time spent in the lawsuit (*Manhart*, 652 F.2d 904, 907). Yet, *Sethy* specifically states: "the amount of

attorneys' fees they receive should be based on the work performed on the issues in which they were successful." (*Sethy, supra*, p. 898)

(c) Special Circumstances — the Department's "No Win" Position.

Examples of cases in which special circumstances have been found for denying fees to a prevailing plaintiff are *Chastang v. Flynn and Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976); *Sprogis v. United Airlines*, 517 F.2d 387 (7th Cir. 1975); *Sheriff v. Beck*, 452 F.Supp. 1254, 1260 (D. Colo. 1978).

These cases emphasize the equitable nature of attorneys' fee awards under Title VII. In *Chastang*, for example, while money damages were granted, attorneys' fees were denied because special circumstances existed for denying the fees.[6] *Chastang* bears several similarities to this case. It involved a pension plan which differentiated in benefits between men and women. (However, in that case, unlike the present case, the differentiation could not claim to any sound actuarial basis.) The Court there found special circumstances based on, *inter alia*, the following facts: (1) the discriminatory practice was one which was legal at the time it began, before the statute was enacted; (2) it was difficult to amend the pension plan; (3) the EEOC did not take the position that the practice was illegal until three years after the effective date of the statute; (4) even when the EEOC did take such position, it afforded retirement plans the opportunity to come into conformity with the law gradually, the administrator's judgment being given great weight as to a proper timetable; (5) the Plan was amended six months before the plaintiffs brought their lawsuit; and (6) the plan was changed

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[6]This Honorable Court cited *Chastang* as an example of a "special circumstances" case in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 417 fn. 10, 98 S.Ct. 694, 54 L.Ed. 2d 648 (1977).

when what the Court felt was a "murky area of the law" was clarified.

This court in its opinion discussed similar factors which faced your petitioners, (*Manhart*, 435 U.S. 672-674): (1) a reasonable assumption that the Plan was lawful; (2) the complex nature of the problem; (3) the possibility that trustees might have felt changing the plan could be illegal; (4) the conflicting interpretations of the administrative agencies, and (5) the difficulty of amending the Plan. Yet, the petitioners were faced with an even more serious equitable consideration not present in *Chastang*.

After the District Court issued its original preliminary injunction (which was improperly issued because of mootness), the Department might well have settled the litigation with plaintiffs by paying all the requested back pay. Insofar as the plaintiffs were concerned this was all that remained in the lawsuit. However, petitioners were faced with two major obstacles to terminating the lawsuit at that early stage. First, as trustees of a pension fund, petitioners were under a fiduciary obligation to protect the assets of the fund. The ultimate outcome of the case, as decided by this Honorable Court, proved that the action of petitioners was the proper one, *i.e.* to oppose any retroactive refund. Second, petitioners faced the strong possibility that *male* employees would pursue an opposing position under Title VII and might ultimately prevail in a later lawsuit, contending that the "equalization" of contributions violated Title VII in that it discriminated against males as a group.[7]

In fact, as noted, male employees had complaints pending against the Department already filed with the EEOC relative

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[7]Along those lines, one commentator suggests that by having proportionately larger *employer* contributions for females than for males *prior* to the Plan change, the Department in fact discriminated against *men* in favor of women *before* the Plan was changed and now discriminates *more*. "Reverse Sex Discrimination: Manhart," by Spencer Kimball, *American Bar Foundation Research Journal*, Winter 1979, p. 102.

to the contribution and benefit levels of the Retirement Plan. (Appendix F). Where women live longer than men, a "unisex" rate of contribution results in underfunding women's benefits and overfunding men's, so that the additional funding for the men is used to pay for the women, resulting in a male subsidy of females. This Court recognized this problem when it compared the disparate result of apparently neutral employment testing in *Griggs v. Duke Power Co.* (410 U.S. 424) with the disparate impact which might arise from a gender-neutral pension plan. *Manhart*, 435 U.S. 702, 710 fn. 20.

Petitioners were compelled to carry the litigation forward to avoid potential liability to either males or females.

This Honorable Court noted the "no-win" position in which petitioners found themselves:

> "The employer is in a dilemma; he is damned in the discrimination context no matter what he does." *Manhart, supra*, 435 U.S. 702, 728 fn. 38.

It was in the latter context that your petitioners brought this matter to the attention of the Supreme Court.

Where Title VII is concerned, "A fair adversary process presupposes both a vigorous prosecution *and* a *vigorous defense*." (Emphasis ours). *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 419, 98 S.Ct. 694, 54 L.Ed. 2d 648 (1977). Congress, this Court noted, had entrusted the vindication of Title VII policy to the judicial process.

If a defense is to be vigorous, the defendant should not be penalized by being required to pay attorneys' fees under circumstances where it had no choice but to go forward with the case, obtained a hearing in the Supreme Court and obtained a reversal, preserving the fund which it was duty-bound to do. Yet, this is precisely what has happened here. With respect to this case, this Court's ruling that no refund of contributions are required is the only ruling which affected the parties to the case.

There are two purposes of Congress for granting attorneys' fees:

1. To vindicate a policy which Congress Considers to be of highest priority.

2. To award fees against a violator of Federal laws so as to discourage further violations.

Neither purpose is present in this case.

What the policy of Congress was, with respect to differentiation between males and females in industrial benefit plans, was not decided until the parent case. Prior thereto, the agencies had conflicting views (*Manhart*, 435 U.S. 702, 720 fn. 37). This lawsuit did not vindicate an established policy being disregarded by a recalcitrant defendant, but rather represented a change in the law which has created a whole new series of problems. Indeed, in the present case, the Court faced a relatively simple problem which was resolved in a simple way, *i.e.* pension trustees can equalize the contribution rates at the expense of the male employees as a class. But, the result has created a whole new series of extremely complex questions represented in such cases as *EEOC v. Colby College*, 589 F.2d 1139, 1145-1146 (1st Cir. 1978); *Spirit v. TIAA-CREF and Long Island University*, 475 F.Supp. 1298 (S.D.N.Y. 1979); *Peters v. Wayne State University*, 476 F.Supp. 1343 (E.D. Mich.); *Sobel v. Yeshiva University*, 477 F.Supp. 1161 (S.D.N.Y. 1979); *Norris v. Arizona Gov. Comm.*, 486 F.Supp. 645 (D. Ariz.1980); and *Women in City Government United et al. v. City of New York*, 75 Civ. 2868 (MJL) (S.D.N.Y. 1981).

In an address to the 59th Annual Convention of the National Council on Teacher Retirement, Albert B. Lewis, New York State Superintendent of Insurance, on September 28, 1981, suggested that the additional costs resulting from the potential liability of a pension system under the first three cases cited above, as a result of the *Manhart* decision, could bankrupt the colleges and universities which use *TIAA-CREF* as pension carrier, as well as TIAA-CREF.

The potential liability was such that Mr. Lewis suggested Federal legislation tantamount to disaster relief may be called for.

As late as four years *after* the Civil Rights Act was passed, at least one Committee of Congress was still of the belief that Title VII did *not* require identical contributions or pension benefit rates. Thus, on May 8, 1968, Senator Clark's report No. 1111 of the Committee on Labor and Public Welfare of the U.S. Senate proposed an amendment to Title IV and Title VII of the Civil Rights Act of 1964 and on page 17 of the report stated:

> "Subsection (d) . . . the original intent of Congress in enacting Title VII was not to prohibit differentiation treatment of male and female employees under retirement or pension plans similar to the differentiation made under Social Security."

Therefore, it can hardly be argued that federal policy was vindicated.

Nor is an award of attorneys' fees necessary to discourage further violations. This court explicitly recognized that fact in dealing with the question of retroactive relief. *Manhart*, 435 U.S. 702, 720-721.

The District Court took an unusual case and applied to it a mechanistic approach ignoring the rule of this case and the rule of *Piggie Park* relative to Title VII attorneys' fees.

If the Ninth Circuit opinion stands, there is no basis for application of equitable principles relative to attorneys' fees where a defendant is concerned.

POINT TWO

THE AMOUNT OF FEES AWARDED IN THIS CASE WAS IMPROPER BECAUSE THE LOWER COURTS FAILED IN THEIR RESPONSIBILITY TO ENSURE THAT FEES AWARDED ARE REASONABLE BY MAKING FINDINGS AS TO THE BASIS OF THE FEE AWARD.

An award of fees is addressed to the discretion of the District Court. For that reason, findings are necessary to insure meaningful appellate review of the exercise of such

discretion. *Harkless v. Sweeny Independent School District*, 608 F.2d 594, 596 (5th Cir. 1979). The Title VII rule that fees are to be awarded only where reasonable under all circumstances mandates that both the defendant and the appellate courts be apprised of how the fee was calculated. Yet, here, contrary to its own prior decisions and those of other circuits, the Ninth Circuit has established a rule that findings (and a hearing) are not necessary. *Manhart*, 652 F.2d 904, 908.

The right to a hearing on the question of attorneys' fees in class actions is well established. *Lindy Bros. Builders Inc. v. American Radiator & Standard Corp.*, 487 F.2d 161, 170 (3rd Cir. 1973); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468 (2d Cir. 1974).

Moreover, the propriety of a hearing regarding attorneys' fees is also true in civil rights class actions. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 715 (5th Cir. 1974).

A hearing without findings is not complete. Without findings, review is impossible and a hearing may therefore be meaningless. It permits disregard of the evidence and allows arbitrary fixing of a fee which relates neither to the facts nor the law. For example, see *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69 (9th Cir. 1975). ("No correlation between the evidence presented and the amount awarded is apparent from the record.")

One vital purpose for findings of fact and conclusions of law is to enable the appellate courts to be able to determine how the court below arrived at its judgment.

Thus, in *Fountila v. Carter*, 571 F.2d 487, 496 (9th Cir. 1978), the Ninth Circuit reversed the lower court and required findings on an attorneys' fee award, stating:

> "The record on this appeal does not indicate which of the above factors, if any, were taken into account by the district court in determining the amount of the

attorneys' fees awarded. In this posture, a "meaningful review is impossible'."

Similarly, the Ninth Circuit said, in *Kerr v. Screen Extras Guild, Inc., supra* p. 70:

> "Because the record before us is devoid of information as to the factors considered by the district court in its determination, a meaningful review is impossible. Therefore, the case is remanded for the limited purpose of making findings of fact and conclusions of law. The matter can be covered by an opinion containing a recital of the *facts* and the *guidelines* considered in determining attorney's fees." (emphasis added.)

Again, the ninth circuit said in *Buxton v. Patel*, 595 F.2d 1182, 1185 (1979), at footnote 2:

> "It would aid informed review if trial judges weighing the appropriateness of attorneys' fees would set forth briefly the factors underlying their decisions."

Similarly, in an attorneys' fee action, in the Tenth Circuit case of *Featherstone v. Barash*, 345 F.2d 246, 249 (10th Cir. 1965), the court said:

> "The purposes of this rule [regarding findings of fact and conclusions of law] are to aid the appellate court by affording it a clear understanding of the ground or basis of the decision of the trial court, [. . .] and to evoke care on the part of the trial judge in considering and adjudicating the facts in dispute. The sufficiency of findings must be measured by the requirements of the rule and in the light of those purposes."
>
> See also *Sethy v. Alameda County Water District*, 602 F.2d 895, 897 (9th Cir. 1980).

The Court of Appeals cited *Dennis v. Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980) in support of its position denying the need for findings. Yet, in *Dennis v. Chang*, the trial court did make findings. (See *Dennis, supra* p. 1308) and

in fact calculated fees for one attorney at a lower hourly rate.

In the present case, all that the District Court cited, in ruling from the bench, as the basis for its award was: "reasonable time spent by the attorneys, the complexity of the issues, the skill and experience of the attorneys, the results obtained, and the need to adequately compensate lawyers who take on Title VII cases." Based thereon, the judge awarded $165,000.

The court made no statement as to what it found relative to those factors cited. The Court made no determination of how many hours it was compensating the attorneys for. It made no determination of what was a reasonable hourly rate. It made no determination of what multiplier it was using. It made no determination of the issues on which the plaintiffs' attorneys prevailed, or the extent to which they prevailed on those issues.

In *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 the Ninth Circuit set forth the 12 factors for consideration for attorneys' fees contained in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) holding that the "failure to consider such factors constitutes an abuse of discretion." The court then remanded that case for findings.

In *Manhart*, citing *Kerr*, the Ninth Circuit now states "a statement by the court that it has considered a *Kerr* factor suffices." *Manhart*, 652 F.2d 904, 908. Such result is plainly contrary to *Johnson v. Georgia Highway Express, Inc.*, *supra* p. 717; *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 188 (1974); *Gay v. Board of Trustees of San Jacinto College*, 608 F.2d 127, 128 (5th Cir. 1979), and the clear spirit and intent behind the *Kerr* decision. (Compare *Copeland v. Marshall*, 641 F.2d 880, 890 (D.C.Cir. 1980) to the effect that a conclusionary statement of the kind made by the District Court in this case "very often leads to reversal and remand.")

With less than ten hours of actual court time of which the trial judge observed at the most five hours, the court was under a duty to examine the time claimed (some 1600 hours for both counsel) to be sure it was reasonable.

POINT THREE

ASSUMING ARGUENDO THAT ATTORNEY'S FEES MAY BE AWARDED, THE AMOUNT OF THE FEES AWARDED WAS CONTRARY TO THE LAW OF THIS CASE AND TO THE RULE THAT FEES AWARDED MUST BE REASONABLE UNDER ALL CIRCUMSTANCES.

On the amount of the fees awarded, the Court of Appeals again took a position that is in conflict with the Supreme Court in this case and with other circuits as well as other opinions in its own circuit.

While your petitioners do not know how the District Court determined the amount of the fees awarded, it is obvious that the amount is larger than the maximum requested without a multiplier. (Excluding the multiplier, IBEW counsel requested $104,325 and Ms. Burns $17,310. They were awarded $135,000 and $30,000, respectively, a difference of $43,365.)

That $165,000 figure is large enough to reflect payment for *all* hours claimed in the lawsuit, including all time spent on issues which plaintiffs lost, *i.e.*, the back pay issue and the non-Title VII issues (including the plaintiffs' premature appeal from the early dismissal of some causes of action and the subsequent dismissal of all of the non-Title VII causes), and more. The amount of an award under Title VII must be *reasonable* under all circumstances (42 U.S.C. § 2000e-5(k)). If fees will be granted to the prevailing party only in the absence of special circumstances which would make an award unjust (*Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)), then the *amount of* a fee award is only reasonable in the absence of special circumstances which would make the *amount* unjust. The law of this case is that the plaintiffs are not to receive back pay

because it would be inequitable to defendants. It is therefore contrary to the law of the case to award counsel fees for time spent on the back pay issue. It is likewise unreasonable under the special circumstances of this case to allow fees for the time spent on the non-Title VII issues. The only reason for pressing those issues was to gain back pay on different theories.

The Ninth Circuit has stated the correct rule often, as have other circuits:

> "[T]he amount of the award should also be *proportionate to the extent* the plaintiff prevails in the suit." (Emphasis added.) *Molina v. Richardson*, 578 F.2d 846, 854 fn. 16 (9th Cir. 1978); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972); *de Laurier v. San Diego Unified School District*, 588 F.2d 674, 685 fn. 22 (9th Cir. 1978); *Williams v. General Foods Corp.*, 492 F.2d 399, 409 (7th Cir. 1974); *Adams v. Reed*, 567 F.2d 1283, 1288 (5th Cir. 1978).

The purpose of limiting fees to the *extent* that a plaintiff prevails is another aspect of the equitable nature of Title VII remedies. To reward counsel for matters on which he did *not* prevail is inequitable to a defendant, penalizes the defendant by subjecting him to the fees of both parties to the lawsuit when he was correct in defending the suit, and discourages the "vigorous defense" which this court has held is requ..ed for a fair adversary process under Title VII. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1977).

Assuming *arguendo* plaintiffs were prevailing parties in the absence of special circumstances for denial of fees, the amount awarded is also excessive for the following additional reasons:

1. It includes a multiplier.

2. It compensates the plaintiffs at a so-called going rate in the community, where plaintiffs' reasonable rate was established by the commercial market rate paid by IBEW.

3. It compensates counsel at current 1979 rates when the work was performed and paid for during the years 1973 through 1978.

4. It provides no reduction in hours requested, for any reason, where there were several bases for such reductions.

(a) Multiplier.

In the present case, the District Court stated as one of the factors which served as the basis for its award "the need to adequately compensate lawyers who take on Title VII cases."

There is no statutory authority which provides that lawyers in Title VII cases are to be awarded *more* than lawyers in other cases. Yet, from the size of the award made to counsel, it is apparent that either the trial judge granted a "multiplier" in addition to the total hourly compensation requested or that he granted fees at an hourly rate higher than requested.

Surely, adequate compensation was calculated when the attorneys were allowed *all* of the hours requested at the *maximum* hourly rate *requested*. The hourly rate requested was much higher than the rate the attorneys had charged IBEW. The attorneys contended that such higher rate was the actual hourly value of their services, that they had charged the union the lower standard rates because the union was a long-standing client. If such was the case, then the addition of a multiplier was plainly over and above "adequate" compensation and constituted *super*multiplier.

The fact that there was no reduction of hourly rate or hours requested for any reason makes it clear that plaintiffs' counsel were more than adequately compensated without the addition of a multiplier.

Furthermore, there is no statutory authority for a multiplier.

In the case of *Oliver v. Kalamazoo Bd. of Ed.*, 576 F.2d 714 (6th Cir. 1978), at page 715, the Court stated:

> "We find that the district court *abused its discretion in employing the multiplier* to increase the attorneys' fees award. The applicable statute, 20 U.S.C. §1617, *only* provides for the recovery of 'a reasonable attorney's fee.' " (Emphasis added).

Likewise, there is *no provision* in Title VII which provides for a multiplier. The section, like that involved in the *Oliver* case, provides only for recovery of a "reasonable attorney's fee." (42 U.S.C. § 2000e-5(k).)

Accord:

> *Northcross v. Board of Memphis City Schools*, 611 F.2d 624, 638 (6th Cir. 1979).

Thus, it is clear that a multiplier is inappropriate since it both penalizes the defendants, contrary to the direction of the Supreme Court, and provides a windfall to the counsel for plaintiffs. Moreover, here it provides this where the party penalized prevailed on most, if not all of the issues between the parties and had no choice but to carry the litigation forward.

The award of a fee which compensates counsel for all of the time spent, including those hours spent on issues lost,[8] together with a multiplier, places the interests of the attorneys ahead of those of the class he represents. Such a holding encourages the attorney to pursue litigation in the secure knowledge that he will be rewarded even though his clients

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[8]It is sophistry to suggest that because the dismissed causes were directed to the same result as the Title VII claim, the time spent should be bootstrapped to the Title VII time as though plaintiffs had won. The dismissed causes were included to support the back pay claim, were found legally insufficient on unrelated issues and the appeal therefrom untimely.

might be better served by settlement of the litigation or dismissal at an earlier stage. Thus, it is not the attorney who faces the contingency of getting less if he does not prevail on all issues, but his client.

The latter point is particularly significant in this case. Usually, those courts which have granted a multiplier have done so based upon the theory that the attorney is to be rewarded for taking the case on the contingency of receiving no fee if he loses.

> *Copeland v. Marshall*, 641 F.2d 880, 892-893 and 906 (D.C. Cir. 1980).
>
> *Cf., Lamphere v. Brown University*, 610 F.2d 46, 48 (1st Cir. 1979) (contingency factor denied for time during which counsel was compensated).

(b) Market Rate.

In this case, the IBEW attorneys were compensated throughout. They took no risk. The affidavits showed that their standard fee for IBEW was in the higher range of the fees generally charged their union clients. Every month during the litigation they billed IBEW, and every month the bill was paid. The risk was taken by IBEW. And, IBEW took the risk as a public relations expense to win its representational battle with the American Federation of State, County and Municipal Employees, which it subsequently won.

The hourly value of the services is best indicated by the hourly rate actually charged for these services to IBEW. A bill for attorneys' services that is paid in full is normally *prima facie* evidence of the value of those services. Thus, in California, if the union had not paid for the services rendered, the attorneys' recovery for breach of contract, for an account stated, would be the amount billed IBEW based on accepted rates. ($68,776.25) See, for example, *Fracasse v. Brent*, 6 Cal.3d 784, 791 (1972); *Oliver v. Campbell*, 43 Cal.2d 298, 302 (1954). Compare *Denio v. City of Hun-*

tington Beach, 22 Cal.2d 580, 591 (1943). The right to recover a higher *quantum meruit* rate would have existed only if the union had prevented completion of the contract. (*Fracasse*, *supra*, p. 791; *Oliver*, *supra*, p. 303.)

Thus the union attorneys received higher than true standard rate plus a *super*-multiplier.

It may be argued that the complexity of the case required a higher fee or a multiplier. However, it must be remembered that the amount awarded at least compensated the attorneys for *every hour* claimed, *i.e.*, some 1400 hours. Surely, payment for all the time claimed compensates for the complexity, too. In this case, there were less than ten total hours spent in court, including the time spent on the fees. Virtually all of the time claimed involved out-of-court activities. The case was tried on summary judgment. There were no difficult fact issues, no extensive trial preparation, no depositions, no long witness interviews, no lengthy reviews of transcripts, and only minimal discovery. Hence, the only complexity was statutory interpretation, and the allowance of *all* hours claimed certainly compensated counsel for all the time necessary to resolve that complexity.

(c) Current Rates for Past Services.

Nor did the hourly rate claimed make allowance for the fact that the work was performed at a time when the hourly rates which were then chargeable would have been lower, in the years 1973-1978, despite the fact that the union counsel was paid at that time.

(d) No Reduction for Any Reason.

Moreover, there was no apparent reduction of any hours for items that other courts will not allow or only allow at a reduced rate. The Department requested such reductions.

Johnson v. Georgia Highway Express Inc., 488 F.2d 714, 719 (5th Cir. 1974) lists the guidelines for setting fees. At page 717, the court lists items not chargeable as, among other items, including, duplicated effort, improperly charged

hours, time deemed unessential and improper utilization of time. The court said:

> "It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by nonlawyers but which a lawyer may do because he has no other help available."

See also *Norwood v. Harrison*, 410 F.Supp. 133, 142 fn. 10 (N.D. Miss. 1976).

Plaintiffs' counsel, for example, claimed the same fee for a telephone conversation or travel time as they expected for Supreme Court appearances.

Some courts have reduced hourly rates or hours for failure to produce adequate records describing the time and activities. *Davis v. County of Los Angeles*, 8 E.P.D ¶ 9444, pp. 5047, 5048 (C.D. Cal. 1974), vac. and dism'd for mootness 440 U.S. 625 (1979).

Ms. Burns had no records as to time usage. IBEW counsel maintained no records which differentiated between time spent on the different issues of the lawsuit, or for the first three years of the lawsuit for the specific activities involved. Yet there was no reduction of hours granted.

There was no reduction of rates for different quality of activities where such were determinable in the activities of the lawyers. *Lea v. Cone Mills Corp.*, 467 F.2d 277, 280 (4th Cir. 1972). There was no reduction for duplication of efforts. See for example, *Weisenberger v. Huecker*, 593 F.2d 49, 54 fn. 12 (6th Cir. 1979); *Reynolds v. Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978); *Lea v. Cone Mills Corp., supra*, p. 279 (4th Cir. 1972); *Van Davis v. Los Angeles County*, 8 E.P.D. ¶ 9444, pp. 5047, 5048; *Bowl America Inc. v. Fair Lanes, Inc.*, 299 F.Supp. 1080, 1100 (D. Md. 1969). There was no reduction for activities unrelated to litigation, *Merole v. Atlantic Richfield Co.*, 493 F.2d 292, 296 (3rd Cir. 1974), or not properly chargeable.

Johnson v. Georgia Highway Express, 488 F.2d 714, 717 (4th Cir. 1974).

The trial judge stated he had not sat down with a calculator and gone over the fees on an hourly basis because that can lead to an unfair conclusion. It is difficult to see how accurately determining fees can be unfair. But the failure to properly calculate a reasonable fee is likely to lead to the arbitrary fixing of an amount not necessarily related to the work done.

Conclusion.

It is important that attorneys' fees be made available to plaintiffs to encourage the vindication of Title VII rights so as to carry out the will of Congress. But, it is just as important that defense counsel not be discouraged from proving a meritorious defense because his client, win or lose, will have to pay fees for both counsel, particularly where the client is a pension trustee upholding his fiduciary duty to a pension trust. That, we submit, is not the kind of equitable treatment to which petitioners are entitled under the special circumstances of this case.

Hence, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

IRA REINER,
City Attorney,
EDWARD C. FARRELL,
Chief Assistant City Attorney
for Water and Power,
DAVID J. OLIPHANT,
Deputy City Attorney,
Attorneys for Petitioners.

APPENDIX A.

Judgment.

United States District Court Central District of California.

Marie Manhart, *et al.*, Plaintiffs, vs. City of Los Angeles, Department of Water and Power, etc., *et al.*, Defendants. No. CV 73-2272-HP.

Filed: February 22, 1979.

Having received the remittitur from the Ninth Circuit Court of Appeals, having held an evidentiary hearing on the issue of attorneys' fees and finding it appropriate now to enter final judgment,

IT IS ORDERED AND ADJUDGED:

1. That the practice of the Department of Water and Power of the City of Los Angeles which required female employees to make larger monthly contributions to the Department of Water and Power Employees' Retirement, Disability, and Death Benefit Insurance Plan ("Plan") than their male counterparts is an unlawful employment practice within the meaning of Section 701(a)(1) of the Equal Employment Opportunity Act of 1972 (42 U.S.C. §2000e-2(a));

2. That defendants are permanently enjoined from requiring female employees to make larger contributions to the Plan than their male counterparts;

3. That defendants pay counsel for the plaintiffs reasonable attorneys' fees in the amount of $135,000.00 to the firm of Schwartz, Steinsapir, Dohrmann & Krepack and $30,000.00 to Katherine Stoll Burns;

4. That all remaining causes of action stated in plain-

tiffs' Complaint are dismissed with prejudice; and

5. That each side bear its own costs of suit other than attorneys' fees as set forth in paragraph 3 above.

DATED: February 21, 1979.

/s/ Harry Pregerson
HARRY PREGERSON
UNITED STATES DISTRICT JUDGE

APPENDIX B.

Opinion of the United States Court of Appeals, Ninth Circuit.

Marie Manhart, Carolyn Mayshack, Margerie Stoop, Alice F. Muller and Ethel L. Lehman, individually and on behalf of all other persons similarly situated; Committee to Protect Women's Retirement Benefits; and International Brotherhood of Electrical Workers, Local Union No. 18, Plaintiffs-Appellees, v. City of Los Angeles, Department of Water and Power, a body corporate and politic; Members of the Board of Water and Power Commissioners of the Department of Water and Power, City of Los Angeles; Members of the Board of Administration of the Department of Water and Power Employees' Retirement, Disability and Death Benefits Insurance Plan; Henry G. Bodkin, Jr.; Katherine B. Dunlap; Burton J. Gindler; Michael Glazer; Herbert C. Ward; Louis J. Weidner, Jr.; Ralph E. Powell; Leo W. Sudmeier, Jr.; William D. Sachau; and Robert V. Phillips Defendants-Appellants. No. 79-3225.

Argued and Submitted Feb. 2, 1981. Decided Aug. 7, 1981.

Class action was brought challenging under Title VII city department's requirement that female employees make larger contributions to its pension fund than male employees. The United States District Court for the Central District of California, Harry Pregerson, J., granted plaintiffs the relief sought under Title VII, but dismissed their other claims, and defendants appealed. The Court of Appeals, Ninth Circuit, 553 F.2d 581, affirmed, and certiorari was granted. The United States Supreme Court, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657, Justice Stevens, upheld plaintiffs' claim for injunctive relief, but denied claim for back pay. After remand to the Court of Appeals, 577 F.2d

98, the United States District Court for the Central District of California, Harry Pregerson, J., awarded plaintiffs $165,000 in attorney fees, and defendants appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) plaintiffs were prevailing parties to whom attorney fees could be awarded; (2) failure of District Court to make detailed findings was not an abuse of discretion, and neither was an evidentiary hearing required; (3) award was within discretion of District Court; and (4) plaintiffs were entitled to attorney fees for time spent litigating fees issue itself in District Court and on appeal.

Affirmed.

Kilkenny, Circuit Judge, dissented and filed opinion.

Appeal from the United States District Court for the Central District of California.

Before KILKENNY, FLETCHER, and CANBY, Circuit Judges.

CANBY, Circuit Judge.

This suit began as a class action brought on behalf of all women employed by the Los Angeles Department of Water and Power who had contributed to the department's pension fund. The suit alleged that the city discriminated against women by requiring them to contribute to the fund at a higher rate than male employees. The plaintiffs made claims under title VII of the Civil Rights Act of 1964, § 1983 of the Civil Rights Act of 1866, the fourteenth amendment of the United States Constitution, and the California Constitution. They requested back pay and injunctive relief. The district court granted plaintiffs the relief sought under Title VII, but dismissed their other claims.

In *Manhart v. City of Los Angeles*, 553 F.2d 581 (9th Cir. 1976), this court upheld plaintiffs' Title VII claim on the merits. In turn, in *Los Angeles Department of Water*

& Power v. Manhart, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), the Supreme Court upheld plaintiffs' claim for injunctive relief, but denied the claim for back pay because "[r]etroactive liability could be devastating for a pension fund." *Id.* at 722, 98 S.Ct. at 1382. On remand, the district court awarded plaintiffs $165,000 in attorneys' fees. Defendants now appeal that award. We affirm the decision of the district court.

PREVAILING PARTY

Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . ." The city argues that the plaintiffs in this action are not prevailing parties because their claim for damages was denied by the Supreme Court. We disagree. Plaintiffs should be considered prevailing parties so long as they prevail on " 'a significant issue in litigation which achieve[d] . . . the benefit which the parties sought in bringing suit.' " *Williams v. Alioto*, 625 F.2d 845, 847 (9th Cir. 1980) (quoting *Sethy v. Alameda County Water District*, 602 F.2d 894, 897-98 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 731 (1980)).[1] By proving that the city had discriminated against them on the basis of gender, the plaintiffs prevailed on a significant issue in litigation. By securing an injunction to prohibit the city

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[1] In *Hanrahan v. Hampton*, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980), the Supreme Court stated that an award of attorney's fees would be " 'especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on *all* issues.' " *Id.* at 757, 100 S.Ct. at 1989 (quoting S.Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 5912). Although Hanrahan was based on the attorneys' fees provision in 42 U.S.C. § 1988, the Court noted that it was patterned after § 706(k) of Title VII. 446 U.S. at 758 n. 4, 100 S.Ct. at 1989 n. 4. The same rule should therefore apply here.

from continuing its discriminatory practice, they achieved a large part of the benefit which they sought. That is enough to make them prevailing parties for the purposes of § 706(k). *Sethy v. Alameda County Water District*, 602 F.2d at 897-98. This court has specifically held that a Title VII plaintiff who wins injunctive relief is a prevailing party under § 706(k), even though their claim for damages is denied. *Rosenfeld v. Southern Pacific Co.*, 519 F.2d 527, 529 (9th Cir. 1975). Therefore, the plaintiffs in this action are prevailing parties to whom attorneys' fees may be awarded.

AMOUNT OF ATTORNEYS' FEES

Determining the amount of attorneys' fees to be awarded is within the discretion of the district court. An award will be overturned only for an abuse of that discretion. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69 (9th Cir. 1975), *cert. denied sub nom. Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). In *Kerr*, this court listed 12 factors to be considered in determining a reasonable attorney's fee, and stated that failure to consider the 12 factors in an abuse of discretion.

The record in this case does not contain a detailed analysis of the 12 factors by the district court. After a hearing on attorneys' fees, the district court stated the following conclusion:

> I have reviewed, of course, the exhibits. I have had them for some time. I have studied the briefs of the parties. And, considering what I regard to be the relevant factors, I am now prepared to state what I regard to be reasonable attorneys' fees under Title VII.
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> In fixing those fees, I, of course, am taking into account the reasonable time spent by the attorneys, the complexity of the issues, the skill and experience of the

> attorneys, the results obtained, and the need to adequately compensate lawyers who take on Title VII cases. I have not sat down with a calculator and gone over each hour, and made a determination of an hour-by-hour or minute-by-minute basis applying to that time a reasonably hourly rate. I think that approach, which is mechanical, can lead, in some cases, to an unfair conclusion.

The court then awarded $135,000 in attorneys' fees to counsel for the union, and $30,000 to counsel for the individual plaintiffs.[2]

The city argues that the failure of the district court to make detailed findings was an abuse of discretion. We disagree. *Kerr* does not require the court to make precise calculations on the record. Kerr's requirements are met by

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[2]Counsel for the union requested the following fees:

Partners' Hourly Fees (360¼ Hours at $100.00/hour)	$36,025.00
Senior Associates' Fees (613 hours at $80.00/hour)	$49,040.00
Junior Associates' Fees (265¼ hours at $55.00/hour)	$14,616.00
Law Clerks ($25.00/hour)	$ 4,644.00
SUBTOTAL	$104,325.00
Multiplier	1.75
TOTAL	$182,568.75

Of this requested amount, the district court allowed $135,000.00.

Counsel for the individual plaintiffs requested the following fees:

215 hours at $80 per hour [the attorney's time]	$17,200.00
2 hours at $55 per hour [associate's times]	110.00
SUBTOTAL	$17,310.00
Multiplier	1.75
TOTAL	$30,292.50

Of this requested amount, the district court allowed $30,000.00.

"a recital of the facts and the guidelines considered in determining attorneys' fees." 526 F.2d at 70. The facts contained in the affidavits and briefs submitted by the parties are sufficiently detailed to provide a basis for the award. See *Dennis v. Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980). An evidentiary hearing was not required. *Williams v. Alioto*, 625 F.2d at 849. The court emphasized five factors, approved by *Kerr*, on which it relied. Although we prefer a more detailed analysis than the brief statement made by the district court, it is not required. See *Buxton v. Patel*, 595 F.2d 1182, 1185 n.2 (9th Cir. 1979). A statement by the court that it has considered a *Kerr* factor suffices; the court is not required to detail the mechanics of its application. *Dennis v. Chang, supra*, 611 F.2d at 1308.

In *Fountila v. Carter*, 571 F.2d 487 (9th Cir. 1978), this court remanded for detailed findings when the district court noted on the record its method of calculating attorneys' fees, but failed to indicate any reasons for using that method. *Id.* at 496-97. In this case, however, the court omitted the method of calculation, but adequately identified the factors which entered into its judgment. A remand for findings is therefore unnecessary.

The city also argues that the award was excessive. We disagree. The award was clearly within the discretion of the district court. The plaintiffs presented evidence that their attorneys spent more than 1,400 hours over several years to prepare this case for presentation to the district court, the court of appeals, and the Supreme Court. The plaintiffs presented evidence of the prevailing rates charged by lawyers of similar skill and experience for comparable work. The calculated result was $125,000. Because of the special circumstances of this case, plaintiffs asked the court to multiply that result by 1.75, bringing their total request to

$218,000. The affidavits of plaintiffs' experts indicated that such a request was reasonable.

The district court did not grant the entire amount requested, however. Instead, it settled upon a figure of $165,000. This decision merely recognized that the hours, with a few exceptions, and rates quoted by plaintiffs were reasonable, and that the upward adjustment was justified by the complexity of the case, the uncertainty of success, and the results obtained. This was within the district court's discretion. This case addressed a new and difficult issue. It undoubtedly required a large amount of time and effort.[3] Even those courts which favor use of a formula to calculate attorneys' fees allow the district court to consider those factors to award a higher fee than that produced by the formula. *See Copeland v. Marshall*, 614 F.2d 880, 892-94 (D.C. Cir. 1980). The choice of a multiplier different from the one suggested by plaintiffs was not an abuse of discretion. These upward adjustments are necessarily imprecise, and are entrusted to the discretion of the district court because of that court's intimate knowledge of the proceedings. *Id.* at 893.

The award cannot be deemed excessive because it included fees for time spent in preparing those claims dismissed by the district court. It is true that no compensation may be paid for the time spent to prepare unrelated claims on which plaintiffs did not prevail. *Sethy v. Alameda County*

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[3]The Supreme Court itself noted that this case was the first to challenge pension contribution differences based upon valid actuarial tables. The issues were especially complex, and the probability of success uncertain, because the courts had not addressed the question, and administrative agencies held conflicting views. The potential impact of this case is huge. More than 50 million persons in this country belong to pension plans affected by the decision. The prohibition against gender based pension contributions represents a radical departure from past practice. *See Los Angeles Department of Water & Power v. Manhart*, 435 U.S. at 720-22, 98 S.Ct. at 1381-82.

Water District, 602 F.2d at 898. In this case, however, plaintiffs pursued several claims to remedy the same injury, gender discrimination. Under those circumstances, plaintiffs are entitled to an award for all time spent in pursuit of their ultimate goal. *Copeland v. Marshall*, 641 F.2d at 892 n.18; *Lamphere v. Brown University*, 610 F.2d 46, 47 (1st Cir. 1979); see *Seattle School District v. Washington*, 633 F.2d 1338, 1349 (9th Cir. 1980).

The award also cannot be deemed excessive because it allowed a higher fee than set by the agreement between the union and its attorneys. The statute authorizes payment of a reasonable fee, not the fee agreed upon by the parties and their attorneys. The fee agreed upon is therefore not decisive. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974); *Clark v. American Marine Corp.*, 320 F.Supp. 709-711 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971).

Finally, plaintiffs have requested attorneys' fees for time spent litigating the fees issue itself in district court and on appeal. They are entitled to such an award. *Williams v. Alioto*, 625 F.2d at 850; *Rosenfeld v. Southern Pacific Co.*, 519 F.2d at 530; *Johnson v. Mississippi*, 606 F.2d 635, 638-39 (5th Cir. 1979). It would be inconsistent to dilute an award of fees by refusing to compensate an attorney for time spent to establish a reasonable fee. *Lund v. Affleck*, 587 F.2d 75, 77 (1st Cir. 1978). We therefore remand to the district court to determine a reasonable fee for time spent by plaintiffs' attorneys on this issue.

AFFIRMED.

KILKENNY, Circuit Judge, dissenting:

The majority would add another case to the growing list of those that would penalize the public for making a ligitimate challenge to the validity of a claim in a Title VII

action. That the appellants had a legitimate reason for defending the action and pursuing the litigation through the courts is answered beyond all question by the Supreme Court's decision in the parent case, *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 719-20, 98 S.Ct. 1370, 1380-81, 55 L.Ed.2d 657 (1978), from which I quote:

> ". . . Although we now have no doubt about the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful. The courts had been silent on the question and the administrative agencies had conflicting views. The Department's failure to act more swiftly is a sign, not of its recalcitrance, but of the problem's complexity. As commentators have noted, pension administrators could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their 'actuarial share' of the pension burden." [Footnotes omitted].

This language was used in connection with the Supreme Court's decision rejecting the suggestion to make its opinion retroactive. The Court there commented "Courts have also shown sensitivity to the special dangers of retroactive Title VII awards in this field." *Id.* at 722, 98 S.Ct. at 1382. My dissent, although brief, challenges most, if not all, of the conclusions of the majority.

ALLOWANCE OF ATTORNEY FEES

I am convinced that the equitable principles employed by the Supreme Court in refusing to make the decision in the parent case retroactive, should be fully utilized on the issue in connection with the allowance of attorney fees. Inasmuch

as the Supreme Court has recognized that conscientious and intelligent administrators of pension funds [here public funds] who did not have the benefit of extensive briefs and arguments as presented to the courts might well have assumed that a program like the department employed was entirely lawful. Moreover, it recognized that the courts had been silent on the subject and that administrative agencies had conflicting views. The Court also observed that the department's failure to act more swiftly was a sign not of recalcitrance, but of the problem's complexity. In the light of these facts and the conclusions of the Supreme Court, there is no sound reason why the equitable principles mentioned in the Supreme Court decision should not likewise be used by us in declaring that an award of attorney fees under the facts and circumstances of this case was an abuse of discretion on the part of the district court. In these circumstances, public officials, such as those before us, the public agency which they represent, and the public in general should not be penalized for defending a claim which they clearly had a right to defend and might have been liable in damages if they did not raise and litigate the issue to its ultimate destination, The Supreme Court. We must remember that the "prevailing party" is entitled to attorney fees under § 706(k) of Title VII, not as a matter of right, but in the discretion of the court.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), is not contrary to my conclusions. The Albemarle Court was not faced with the same factual background as we have before us when it concluded that an award of back pay should not be conditioned on a showing of bad faith. *Id.* at 422-423, 95 S.Ct. at 2373-74. At the same time, that Court also held that back pay was not to be awarded automatically in every case. Consequently, the *Albemarle* presumption in favor of retroactive

liability should not be applied to the allowance of attorney fees on a factual background, such as here, where the public agency and authorities are, in a sense, compelled to deny a claim. Here, we have the spectre of an enormous attorney fee being assessed against public authorities, even though those authorities were almost compelled to defend against the claim and in the language of the Supreme Court had not only the right, *but also the public obligation*, to challenge the claim.

Here, of course, the Supreme Court clearly recognized the right of defendants to defend. There would be no reason whatsoever to discourage the appellants in this case from violating the "Civil Rights Laws" in that no one knew the status of the law on this subject until the Supreme Court spoke in the main case.

The fact that a panel of this court previously awarded costs to the appellees is of no significance. The allowance of costs on appeal is governed entirely by the provisions of Rule 39, FRAP. Surely, the Congress didn't intend, by the enactment of § 706(k), to require a court to make an award of reasonable attorney fees under the provisions of Rule 39. Allowance of costs under Rule 39 is mandatory. Under § 706(k) it is discretionary.

AMOUNT OF ATTORNEY FEES

Assuming *arguendo* that appellants are not entitled to equitable treatment and that attorney fees should be awarded retroactively, nonetheless, the amount of the fee awarded is grossly unjust.

Appellees' amended memorandum in support of their motion for attorney fees in the sum of $182,568.75 was presented on the following basis:

"Partners' Hourly Fees	
(360¼ Hours at $100.00/hour)	$36,025.00

Senior Associates' Fees (613 hours at $80.00/hour)	49,040.00
Junior Associates' Fees (265¼ hours at $55.00/hour)	14,616.00
Law Clerks ($25.00/hour)	4,644.00
SUBTOTAL	$104,325.00
Multiplier	1.75
TOTAL	$182,568.75"

Appellants moved for a hearing on the reasonableness of the attorney fees. The court proceeded to decide the case on the record before it, including some affidavits and denied the appellants' motion. In passing on the issue, the court observed:

> "I have reviewed, of course, the exhibits. I have had them for some time. I have studied the briefs of the parties. And, considering what I regard to be the relevant factors, I am now prepared to state what I regard to be reasonable attorney's fees under Title VII.
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> . . . . . .
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> In fixing those fees, I, of course, am taking into account the reasonable time spent by the attorneys, the complexity of the issues, the skill and experience of the attorneys, the results obtained, and the need to adequately compensate lawyers who take on Title VII cases. I have not sat down with a calculator and gone over each hour, and made a determination on an hour-by-hour or minute-by-minute basis applying to that time a reasonable hourly rate. I think that approach, which is mechanical, can lead, in some cases, to an unfair conclusion."

The affidavits regarding the time spent by and billing rates of the appellees' attorneys before the district court are at best very sketchy and I would say wholly inadequate for the purpose of fixing a reasonable attorney fee.

At the outset, I observe that nowhere did the district court make an analysis of the twelve guidelines in fixing a rea-

sonable attorney fee as fixed by our court in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (CA9 1975), *cert. denied sub nom. Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). In particular, the district court here failed to follow the most important guideline *i.e.*, a separation of the time and labor required and the experience, reputation, and ability of the particular attorney involved. As mentioned in the *Kerr* opinion, the guidelines are consistent with those recommended by the Code of Professional Responsibility of the American Bar Association. In fact, the court could not have made findings on the time and labor required for the very valid reason that the record is so skimpy on those issues that proper findings cannot be made. Moreover, there is little, if anything, in the affidavits to show the amount of time spent or expended by the different partners, associates, and others involved in the prosecution of the case. The fact that the appellees may have mentioned hours and amounts in their motion does not provide proof of the amount of time, nor the value of the services, nor does the fact that the court recites that it reviewed the briefs of the parties supply proof of the factors mentioned in the briefs.

Here, I note that the case was first filed in 1973 and no doubt considerable of the work was performed long prior to the filing of the motion in September, 1978. Even if the court could consider the motion itself as evidence, there is nothing to show that the value of attorney fees at the time of the commencement of the action was the same as at the time of the filing of the motion.

The motion of the appellants for attorney fees shows that they took into consideration in figuring the total fee a factor designated as a "multiplier." There is nothing in the attorney fee statute which speaks of a multiplier. It speaks only of a reasonable fee. On this record, it would be a

complete miscarriage of justice to award (1) what would appear to be a reasonable fee of $104,325.00, and (2) add to that fee of $104,325.00 a *multiplier* of some type which was used to bring the total to $182,568.75. Not only are the appellees seeking what might be termed as a reasonable fee, they are adding a *multiplier* to punish public officials and the public for defending an action which was rightfully defended.

In the light of the adjudicated good faith of the appellants in this cause, I would reward their good faith by allowing only a reasonable attorney fee. If an attorney fee is to be awarded, I would remand to the district court for a full fledged hearing on: (1) the twelve guidelines mentioned in *Kerr*; (2) elimination of the multiplier factor in fixing a reasonable fee; (3) in no event, the fee to be in excess of $104,325.00[1]

Appellees contend that this litigation should be treated like complex antitrust litigation and that a large multiplier should be tacked on to a reasonable fee. Their only citation is the Attorney Fees Award Act of 1976, 42 U.S.C. § 1988. Oddly enough, this Act does not even touch upon Title VII fee awards or a multiplier. Even though this case were to be treated like complicated antitrust litigation for fee purposes, a *multiplier* is still not warranted. Here, I emphasize that the case went to the Supreme Court on one difficult issue and one issue alone, interpretation of Title VII, 42 U.S.C. § 2000e-2(h), Act § 703(h). There were no depositions, no witnesses, no complicated fact situation, no parties, other than appellants and appellees, no interlocking directorates or interlocking corporations *and no factual trial on the merits*.

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[1]The multiplier theory is fully discussed in the elaborate dissent of Judge Wilkey in *Copeland v. Marshall*, 641 F.2d 880 (CA DC 1980).

I challenge the majority's statement that the facts contained in the "affidavits *and briefs* submitted by the parties are sufficiently detailed to provide a basis for the award." Certainly, there is nothing in the briefs which the court should consider as proof, and without the statements in the briefs and in the respective motions, there is nothing in the record which would in any manner separate the "grain from the chaff." The court's observations at the close of trial, which the majority treats as findings, demonstrate the hodgepodge of a record which it had before it at the time of making the attorney fee award. The majority apologize for the lack of record by saying "Although we *prefer* a more detailed analysis than the brief statement made by the district court, it is not required." Cited in support of this statement is *Buxton v. Patel*, 595 F.2d 1182, 1185, n. 2 (CA9 1979). Oddly enough, the case cited in support of this statement denied attorney fees to the claimant. Beyond that, the case cited by the majority concluded with the language:

> "Nor did the district judge indicate any *evidence or contention that appellee defended this suit in bad faith*. Given this background the district judge could properly conclude that the purposes of section 1988 would not be served by an award of fees." *Id.* at 1185. [Emphasis added].

In no way does *Buxton* support any one of the majority's conclusions.

PIGGY BACK FEES

To pour salt on the open wound, the appellees requested and were allowed attorney fees for time spent in *litigating the fees issue itself* in the district court and for the appeals. Although some circuits in their enthusiasm to raid the treasuries of public institutions in Title VII attorney fee cases seem to have permitted such a recovery, the only Ninth

Circuit case [42 U.S.C. § 1988] cited in support of appellees' contention is *Williams v. Alioto*, 625 F.2d 845 (CA 9 1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 1123, 68 L.Ed.2d 213 (1981). This case does not even discuss the particular subject. It simply allows an attorney fee on appeal. The case does, however, indicate that under circumstances such as ours, the court should have allowed a full evidentiary hearing on the merits. There the court held that the court did not abuse its discretion in relying on the submitted affidavits and oral argument in setting the fees in the *light of the stipulation of the parties*. Moreover, the court there held that the affidavits before it were *sufficiently detailed* to enable the court to consider all the facts necessary in setting the fees, citing *Dennis v. Chang*, 611 F.2d 1302, 1308-09 (CA9 1980). In *Dennis*, four affidavits were involved. Each affiant itemized the number of hours he or she expended on the case with a short description of each task performed and the time taken to perform it. The court commented on the experience of the counsel in civil rights litigation and that the rates of compensation sought were typical of those earned by experienced attorneys in the community. Here, even the majority concedes we have no such showing. In any event, *Alioto* in no way supports appellants' contention that it is entitled to an award of attorney fees on the type of a record here presented. The Ninth Circuit has not passed on this type of an issue and I would hold that on a record such as the one before us, an award of attorney fees enhancing the value of the *reasonable fee* mentioned in the statute should not be tolerated. Certainly, there is nothing in the Title VII Civil Rights Statute on attorney fees which allows fees in excess of those which are *reasonable* for the *prosecution of the civil rights claim*.

CONCLUSION

I would hold:

(1) that under the peculiar circumstance of this case, as evidenced by the language of the Supreme Court and by the record, attorney fees should not be retroactively awarded;

(2) that the record is wholly deficient on the requirements for the allowance of attorney fees and should be remanded for a full fledged hearing;

(3) that no attorney fees should be allowed on a "multiplier" or other contingency basis.

APPENDIX C.

Order.

In the United States Court of Appeals for the Ninth Circuit.

Marie Manhart, Carolyn Mayshack, Margerie Stoop, Alice F. Muller and Ethel L. Lehman, individually and on behalf of all other persons similarly situated; Committee to Protect Women's Retirement Benefits; and International Brotherhood of Electrical Workers, Local Union No. 18, Plaintiffs-Appellees, vs. City of Los Angeles, Department of Water and Power, a body corporate and politic; Members of the Board of Water and Power Commissioners of the Department of Water and Power, City of Los Angeles; Members of the Board of Administration of the Department of Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan; Henry G. Bodkin, Jr.; Katherine B. Dunlap; Burton J. Gindler; Michael Glazer; Herbert C. Ward: Louis J. Wiedner, Jr.; Ralph E. Powell: Leo W. Sudmeier, Jr.; William D. Sachau; and Robert V. Phillips, Defendants-Appellants. No. 79-3225.

Filed: November 16, 1981.

Before: KILKENNY, FLETCHER AND CANBY, Circuit Judges

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D.

Attorney's Fee; Liability of Commission and United States for Costs.

42 U.S.C. § 2000e-5(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Pub.L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104.

APPENDIX E.

Charter Sections 220.1(1)(a) and (g).

Sec. 220.1. The Department of Water and Power shall also have the power and duty:

(1) To establish and maintain within said Department a general plan and system of retirement, disability, and death benefits, and, in cooperation with its eligible and participating employees, to provide currently out of the Water Revenue Fund and the Power Revenue Fund a portion of the cost under said plan and system, including expenses incident to the administration thereof, subject, however, to the following provisions, to-wit:

(a) That such plan and system shall be maintained in accordance with sound business practices and recognized actuarial methods, and the respective contributions of said employees and said Department, whether prescribed by present or future provisions of said plan and system, may be modified or adjusted, subject to the direction and approval of the Board of Water and Power Commissioners, whenever the Board of Administration, as hereinafter designated, shall find that said business practices or said actuarial methods require such modification or adjustment;

* * *

(g) That such Board of Administration shall at regular intervals, each not exceeding a period of five years, secure a general survey and actuarial report of said plan and system, and said Board, subject to the direction and approval of the Board of Water and Power Commissioners, shall from time to time amend said plan and system in such manner as may be found to be advisable to meet changed conditions, or, as in the light of experience, may be considered necessary;

* * *

APPENDIX F.

§ 7500. Sex Differential in Contribution Rate.

Any city with a population of 1,000,000 or more, and any agency thereof, which has established any pension and retirement plan which requires officers and employees of one sex to pay greater contributions than those of another sex who are the same age shall revise the plan so that the contributions are the same commencing with contributions for service on and after January 1, 1975. This section shall not be construed as requiring or authorizing an increase in the contributions of any members of a pension and retirement plan.

This section shall not be applicable to the Public Employees' Retirement System.

APPENDIX G.

Future Correspondence Will Refer to Charge No.: TLA3 0184.

Date of Violation: 07/72.

Place of Violation: Same as Addressee.

NOTICE OF CHARGE OF
EMPLOYMENT DISCRIMINATION.

You are hereby notified that a charge of employment discrimination under Sec. 706 of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-5, as amended, has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practices or practices is provided herein. The Act does not contemplate that the name of the person bringing the charge be made available to you until the charge is served.

No action on your part is necessary at this time. However, if you wish to submit any information in writing, it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communications cannot be made a part of the record. Section 1602.14 of the Commission's Regulations requires the preservation of all relevant personnel records until this charge is resolved.

We will investigate this charge as soon as possible. However, our heavy backlog of pending work makes it impossible to predict when we will contact you again. We hope that you will hold any questions about this specific complaint in abeyance until we are able to begin the investigation.

Basis of Discrimination: Race or Color, No; Sex, Yes; Religion, No; National Origin, No.

Nature of Charge: Benefits. [Other items not checked omitted in printing.]

Date: Nov. 15, 1972.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

1543 West Olympic Boulevard, Suite 340
LOS ANGELES, CALIFORNIA 90015

IN REPLY REFER TO:
RECEIPT FOR SERVICE OF CHARGE
CASE NUMBER: TLA3 0184

Engineers & Architects vs. L. A. Dept. of Water & Power Association

This document certifies service of a copy of the one attached charge alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

Served by Wendell Wilson, Equal Opportunity Specialist of the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, to

Mr. Irvin E. Remy
Industrial Relations Administrator
Department of Water & Power
111 N. Hope Street
Room 555
Los Angeles, California

RECEIPT ACKNOWLEDGED BY:

/s/ Irvin E. Remy
Signature
/s/ Industrial Relations Administrator
Title
December 8, 1972
Date

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discrimi-

natory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE).

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

1. Your Name: Engineers and Architects Association, Civic Center Chapter; Phone Number 624-9317; Street Address: 417 South Hill Street, Room 756; City: Los Angeles; State: California; Zip Code: 90013.

2. Was the Discrimination Because of: (Please Check one) Race or Color, No; Religious Creed, No; National Origin, No; Sex, Yes.

3. Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all. Name: Department of Water and Power of the City of Los Angeles; Street address: 111 North Hope Street; City: Los Angeles; State: California; Zip Code: 90012. AND (other parties if any) Board of Water and Power Commissioners, Board of Administration and the Administrator-Secretary of the Department of Water and Power Retirement, Disability and Death Benefit Plan.

4. Have you filed this charge with a state or local government agency? Yes.

5. If your charge is against a company or a union, how many employees or members?

6. The most recent date on which this discrimination took place: Month: July; Day: .....; Year: 1972.

7. Explain what unfair thing was done to you. How were other persons treated differently? Please see attached statement.

8. I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date: July 31, 1972.

Subscribed and sworn to before me this 31st day of July, 1972.

/s/ Sandra E. Abrahamian

No. 7

The charged parties have the responsibility, in various measure, for administration of the Retirement, Disability and Death Benefit Plan of the Department. The Plan as structured and administered, discriminates against male employees in that it requires unequal contribution rates during the term of active employment and because, notwithstanding the fact that it has collected greater contributions from male employees during the term of active employment, it pays greater pension benefits to female employees of like standing.

APPENDIX H.

Local Union 18 I.B.E.W., AFL-CIO.

EXHIBIT B.

To: All DWP Women

From: Ruth Blanco, IBEW Coordinator

Recently AFSCME sent out another 'dirty trick' bulletin. They offered for examination only the first paragraph of the Bill. The IBEW offers the entire Bill for your review (reverse side). If you can find anything in this Bill that applies to your DWP Retirement Program, please call me. I am unable to find it. The facts are, you simply can not trust AFSCME — They will print *anything*.

AFSCME — DWP EMPLOYEE

American Federation of State, County and Municipal Employees, AFL-CIO. AFSCME District Council 36, 730 South Western Avenue, Los Angeles, California 90005, (213) 386-7941.

ASSEMBLYWOMAN FONG TAKES AIM
AT RETIREMENT DISCRIMINATION

Assemblywoman March Fong has introduced a bill in the California Legislature which will eliminate retirement discrimination against female employees in the Los Angeles Department of Water & Power.

Assembly Bill 4392, written to eliminate the "Pay More, Receive Less" retirement system for females, currently in effect at DWP, was placed on the legislative agenda May 13. It has been referred to the Assembly Committee on Government Administration.

Assemblywoman Fong, a candidate for the Democratic nomination for California Secretary of State, will be in Los Angeles in the near future to discuss the legislation with

AFSCME members and supporters at the Department of Water & Power.

CALIFORNIA LEGISLATURE — 1973-74 REGULAR SESSION

ASSEMBLY BILL — No. 4392

Introduced by Assemblyman Fong. May 13, 1974.

Referred to Committee on Government Administration.

An act to amend the heading of Article 2 (commencing with Section 21250) of Chapter 9 of Part 3 of Division 5 of Title 2 of the Government Code, relating to retirement of public employees.

LEGISLATIVE COUNSEL'S DIGEST

AB 4392, as introduced, Fong (Gov. Adm.). Public employees: retirement.

(PLEASE POST ON BULLETIN BOARD)

ATTENTION — THIS IS THE COMPLETE FONG BILL

CALIFORNIA LEGISLATURE — 1973-74 REGULAR SESSION

ASSEMBLY BILL — NO. 4392

Introduced by Assemblyman Fong. May 13, 1974.

Referred to Committee on Government Administration.

An act to amend the heading of Article 2 (commencing with Section 21250) of Chapter 9 of Part 3 Division 5 of Title 2 of the Government Code, relating to retirement of public employees.

LEGISLATIVE COUNSEL'S DIGEST

AB 4392, as introduced, Fong (Gov. Adm.). Public employees: retirement.

Makes technical, nonsubstantive change.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The heading of Article 2 (commencing with Section 21250) of Chapter 9 of Part 3 of Division 5 of Title 2 of the Government Code is amended to read:

Article 2. ~~Service~~ Retirement
for Service

We urge AFSCME to take the following oath and cease their dirty tricks:

> "On my honor I swear to tell the whole truth, and nothing but the truth, so help me God"

opeiu #30
afl-cio

(PLEASE POST ON BULLETIN BOARD)

Opposition

1

Office - Supreme Court, U.S.
FILED
FEB 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1399

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

KATHERINE STOLL BURNS,
6261 Variel Avenue,
Woodland Hills, Calif. 91367,
(213) 873-2000,
Attorney for Answering Respondents.

Parker & Son, Inc., Law Printers, Los Angeles Phone 724-6622

Correction of the Questions as Presented by Petitioners.

1. At the outset, Answering Respondents dispute the "Questions Presented" as outlined by petitioners at the beginning of their Petition.

The actual question in this case is whether or not the attorneys for the Respondents are entitled to attorneys' fee when they won a decision of the United States Supreme Court that it is a violation of Title VII of the Civil Rights Act to require female employees to contribute more to a retirement fund than male employees in order to receive the same benefits. It is not true that the public employer defendant had "no choice" but to litigate this issue of whether or not the requirement of greater contributions by female employees was a violation of federal law. Petitioners themselves keep reiterating that equalization of contributions had already been ordered by state law, effective January 1, 1975. They therefore would not subject themselves to criticism if they had conceded that the practice was a violation of federal law and attacked only the award for refund of contributions. Petitioners never did concede the basic issue and argued it to and before the United States Supreme Court. Respondents were the prevailing parties on this issue and petitioners were *not* held correct by the Court on this issue. It is true that the department did prevail on the question of whether or not the female employees who had made such larger contributions were entitled to a refund dating back to the beginning of the three year statute of limitation period before the main action was filed. The refund question, however, was less than half the battle.

The fact that the individual respondents who instituted the action were not allowed a refund of their excess con-

tributions for the statute of limitations period preceding the filing of the action was only a minor defeat to Respondents. This ruling affected only the limited number of persons who had made such excess contributions in the three years before the action was filed. The principle of law established affects all women employees of the Department of Water and Power thereafter employed and all employed women under pension systems in the United States of America and their husbands and families.

2. In their statement of question number 3, petitioners contend that the plaintiff won "only a doctrinal change in the law on a moot issue, but no tangible benefits, the public employer won on all other issues". The central basic issue was whether or not the contributions that female employees made to the retirement system should be equalized. Other reasons and grounds for such equalization were advanced, but abandoned after Respondents won on the Title VII issue, which was the only issue in the prior appeals and the only one decided by the Circuit Court of Appeals and the United States Supreme Court. The question of whether or not the equalization of contributions to a retirement system was required by the Federal Civil Rights Act was never moot. The benefits were equalized by the Department *after* the instant action was commenced pursuant to a State Law, but the question of the rights of the employees under the Federal Civil Rights Act was still in issue, and Respondents prevailed on the vital issue.

3. In their question numbered 4, petitioners inquire whether it is improper to award a multiplier under the Title VII provisions allowing reasonable attorneys' fees to the prevailing party, "particularly where the attorneys took no risk in taking the case but were compensated throughout the litigation". The attorney for Answering Respondents,

namely, Katherine Stoll Burns, did take a risk, was never compensated throughout the litigation and has not received any monies or other compensation whatsoever for her services to date. Her agreement was and is she would accept the fee ordered payable by defendants if she prevailed.

Answering Respondents submit that the true primary question presented is:

> WHEN A PLAINTIFF'S ATTORNEY SUCCEEDS IN THE TRIAL COURT IN OBTAINING A RULING THAT AN EMPLOYER'S PRACTICE IS A VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT AND IS OBLIGED TO DEFEND THIS RULING ON THE DEFENDANT'S PETITION FOR REHEARING IN THE TRIAL COURT, APPEAL TO THE CIRCUIT COURT OF APPEALS AND APPEAL TO THE UNITED STATES SUPREME COURT, AND PLAINTIFF PREVAILS IN ALL FORUMS, IS PLAINTIFF'S ATTORNEY ENTITLED TO A FEE PAYABLE BY THE DEFENDANT?

The obvious answer is yes.

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No. 81-1399

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

COME NOW THE RESPONDENTS MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated and COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS and their attorney, KATHERINE STOLL BURNS, and respectfully represent:

Introductory Statement.

This Appeal involves the propriety of attorney's fees granted by the trial court to the attorneys for the Plaintiffs-Appellees in the case commonly known as the *Manhart* case, reported as *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), holding that requiring women employees to contribute more to a pension fund than men in order to receive the same retirement benefits, is a violation of Title VII of the Civil Rights Act of 1964 as amended in 1972. Specific authority for allowance of fees is contained in 42 U.S.C. Section 1988.

Throughout the proceedings in the United States District Court, in the Circuit Court of Appeals and in the prior proceedings in the United States Supreme Court, all the plaintiffs-appellees were represented by their joint attorneys, KATHERINE STOLL BURNS and SCHWARTZ, STEINSAPIR, DOHRMANN & KREPACK. KATHERINE STOLL BURNS was the attorney who was first consulted and contacted by the individually named plaintiffs and the Committee to Protect Retirement Benefits and had done certain preliminary work on the matter before the International Brotherhood of Electrical Workers, Local Union #18, joined in the efforts to equalize the contributions required of male and female employees to the Retirement Fund of the Department of Water and Power of the City of Los

Angeles. Once litigation was commenced, both sets of attorneys were attorneys for all of the plaintiffs-appellees.

However, the fee and retainer arrangements made by the plaintiffs who consulted KATHERINE STOLL BURNS and by the International Brotherhood of Electrical Workers, Local Union #18, who retained SCHWARTZ, STEINSAPIR, DOHRMANN & KREPACK, were different, and it is therefore appropriate that the two sets of plaintiffs and the two sets of their attorneys file separate briefs.

Comments on Petitioners' Statement of the Case.

On Page 4 of their Petition, petitioners assert: "The longer life expectancy of females over males, which is virtually universally true, was conceded for all material purposes in the case". This is a simplistic statement.

It was not conceded that all females live longer than males. Only about 15% of females live longer than males.

These Answering Respondents and the undersigned know nothing about any representational contest of the Union Respondent with another union. These Respondents initiated proceedings in the case independent of any union contest, and their attorney has never represented the union except for the purpose of the litigation of the case in chief.

Petitioners for the first time of which answering respondents are aware, contend that the Retirement Fund was likewise faced by claims by male employees that the retirement plan discriminated against them. As Appendix G of the Petition is a Notice of Charge of Employment Discrimination filed by male employees with the Equal Opportunity Commission in 1972. Answering Respondents question the propriety of now inserting this purported evidentiary matter in a Petition for Writ of Certiorari filed with the United States Supreme Court. This Notice must have been prepared with tongue in cheek. For instance, the

Charge alleges that the plan discriminates "against male employees in that it requires unequal contribution rates during the term of active employment and because, notwithstanding the fact that it has collected greater contributions from male employees during the term of active employment, it pays greater pension benefits to female employees of like standing". This charge is absolutely untrue and petitioners know it. The contrary was the case. Females were required to pay greater contributions to the pension system than were male employees of like standing. The reference by petitioners to this absolutely incorrect and erroneous charge is demonstrative, Answering Respondents believe, of the flimsiness of their present contentions.

It is possible, that the male employees were referring to the fact that upon the death of a pensioner, the pensioner's surviving spouse and minor children receive benefits from the Department of Water and Power Employees Retirement, Disability and Death Benefit Insurance plan. It is, of course, more likely that the surviving widow of a male employee would be younger and live longer than the average surviving widower of a female employee, and also that male employees would be more likely to leave minor surviving children than would female employees.

The fact that widows would generally live longer than widowers and therefore draw more death benefits would be the only basis for a charge that male employees were required to subsidize females — but the females would be their own widows, not fellow employees. It also means that the female employees were being required to finance their male associates' wives and children. All of this demonstrates the inequity of requiring women employees to contribute more to the Fund than men.

On page 5 of their Petition, petitioners allege that the Department opposed the motion of Respondents for a pre-

liminary injunction to require monthly contribution levels to be "equalized" in the good faith belief that it was contrary to the legal requirement of maintaining an actuarially sound plan and such equalization would have a disparate impact upon male employees by requiring them to subsidize the longer life expectancy of females or to receive less total pay than females. If the Department were really going to have an actuarially sound plan, it should have required caucasian employees to contribute more to the pension fund than black employees because mortality tables demonstrate that until a black reaches a certain high age level, his or her life expectancy is less than that of a caucasian. It also should have required non-smokers to contribute more than smokers because on the whole the mortality of smokers is greater than that of non-smokers. The entire plan was sexually stereotyped and discriminated only against women, and not against persons of varying ethnic or health backgrounds. No better analysis of the entire subject could be presented than your Honorable Court's own opinion in the case in chief.

The Department argues at page 6 of the Petition that since the question of the award of refunds was interwoven with the order to equalize, it had no choice but to attack the entire judgment. This is not correct. Petitioners could have conceded that benefits in the future should be equalized (they contend they were equalized anyway under state law) and litigated only the refund issue.

Petitioners allege that Answering Respondents' attorney claimed compensation at $80 an hour for herself and $55 for an associate. This was the rate originally specified but before and at the hearing on the question of attorney's fees, she claimed $100 an hour for 217 hours and 55 minutes of work performed by herself and $80 an hour for her associate, a total of 219⅝ hours for a basic fee of $21,943.33. The

application of a multiplier resulted in a claim for $38,400. Of this total amount two hours and 55 minutes were spent in discovery proceedings initiated by Defendants. The exact computation alleged by said attorney was:

217⅚ hours at $100.00 per hour	$21,783.33
2 hours at $80.00 an hour —	160.00
Total	$21,943.33

Multiplying the aforesaid total by 1.75 equals $38,400. Answering Respondents' attorney, Katherine Stoll Burns, was allowed a fee of $30,000.

Petitioners omit to state that three independent attorneys (Stuart L. Kadison, Stuart A. Benjamin and Frank Rothman) affirmed in Affidavits that $125 was the customary hourly rate charged by a senior partner in an established law firm. This was then the appropriate hourly rate for Robert M. Dohrmann, the partner of Schwartz, Steinsapir, Dohrmann and Krepack who worked on the case, and for Katherine Stoll Burns, who was a partner in a law firm of Herlihy, Herlihy, Jones & Nelson, then Jones, Nelson, Burns & Endres for the first four years of the case and who was Of Counsel to the firm the last two years. The fee requested is less than the customary hourly rate affirmed by other attorneys.

On page 5 of their Petition, petitioners contend that the individual attorney for these Answering Respondents maintained no time records showing how her time was spent. As the Trial Judge commented on the hearing relative to the application for attorney's fee, an attorney who keeps time records is more likely to spend the time keeping time records than working for his client. In any event, the undersigned did the work in the instant case while a member of a comparatively small law firm and later as a sole practitioner. She never had paralegals or legal assistants or law clerks that might do certain of the work at a separate hourly rate

and the presence of which might require the maintenance of detailed time records. The undersigned did all of the legal work for which she claimed attorney's fee except for two hours spent by her associate. She did not claim attorney's fee for secretarial, typing or mailing or filing, or for traveling to and from the courthouse which she herself did on the mini-bus operating in the City of Los Angeles.

Petitioners also comment that the undersigned was not the "laboring or and" in the law suit. The undersigned again points out facts which petitioners well know, namely, that she was the first attorney approached by the individual plaintiffs and the Committee for Protection of Womens Retirement Benefits. She was so approached because she had successfully litigated the practice of the Department of Water and Power to require female employees to retire at 62 whereas men could work until 65. (This demonstrates that the Department was not so imbued with the exalted status of mortality tables as it now professes). Because of her success in this previous litigation, female members of the Department of Water and Power, including some holding executive positions, sought her services. She engaged in preliminary consultations and research and drafted a proposed complaint before members of the Respondent union joined the original complainants in the institution of litigation. Thereafter she collaborated with the union attorneys in other work done.

Petitioners claim that of the total time claimed by both attorneys, less than 10 hours was spent in actual court time. Petitioners appear to believe that court appearances are the only type of services for which an attorney should be compensated. Court appearances are the dressing on the cake or the tip of the iceberg and do not represent all of the work that an attorney does and must do in order to make an effective court appearance. It is true that attorneys may

charge more for court appearances than for office time on the theory that a court appearance requires an attorney to be put of the office and possibly lose that million dollar case while he or she is away. In the instant case, Answering Repondent's attorney did not charge any more for court attendance than for the other types of work done. All were listed and requested at the same hourly rate.

Petitioners again argue that the plaintiffs were not prevailing parties having obtained nothing but a moot injunction. Answering Respondents again refer to the opinion of the Supreme Court of the United States and point out that this certainly does not represent the obtaining of a moot injunction, but the establishment of an important principle of law.

ARGUMENT.

POINT ONE.

THE RESPONDENTS ARE ENTITLED TO APPROPRIATE ATTORNEY'S FEE FOR ESTABLISHING AN IMPORTANT PRINCIPLE OF LAW.

(a) Law of the Case: The Fact That Plaintiffs Are the Prevailing Parties Is the Law of the Case.

Petitioners comment on the "equitable nature" of Title VII as the Law of the Case, apparently because in reversing the judgment for refund of past contributions, the Supreme Court referred to the equitable nature of the Civil Rights Act.

An objective of Title VII is to rectify and avoid sex-discrimination. Title VII does not require a refund of any back benefits except for equitable purposes. The possible impact of an award for back benefits in retirement systems was the equitable consideration that compelled the Court to abstain from ordering a refund. Petitioners have already received all the "equity" to which they are entitled.

The important major issue on which Plaintiffs prevailed was the establishment that requiring greater contributions from women than men to a pension fund is a violation of Title VII of the Civil Rights Act. At no time in the litigation did defendants concede this, and they litigated the issue to the United States Supreme Court.

It is now the Law of the Case that the plaintiffs-respondents are prevailing parties. Previously, the Circuit Court in an Order filed July 27, 1978 in *Manhart v. City of Los Angeles*, Cases No. 75-2729, 75-2807 and 75-2905, on an application for costs on appeal, ruled:

> "In this case, the plaintiffs have won a victory, in that they established the rule that they sought in a case of first impression. They have been denied a monetary

recovery, not because the rule that they have established would not have entitled them to the recovery in the ordinary case, but only because, the matter being one of first impression, the Supreme Court felt that it would be better not to apply the rule retroactively. Under these circumstances, we conclude that the plaintiffs should recover their costs and that costs should not be awarded to the defendants. Otherwise, the plaintiffs' victory would have been illusory, in that they would have established a rule of law for which they contended and as their reward found themselves subjected to a liability for costs . . ."

(b) Plaintiffs Were in Fact the Prevailing Parties.

Answering respondents reiterate again that the plaintiffs were the prevailing parties in establishing an important principle of law which petitioners fought all the way to the United States Supreme Court and in fact still appear to be arguing. That State Law had required a change in the pension system so as to equalize contributions has no bearing on the fact that Federal Law interpretation had not yet been established. Furthermore, the State legislature might have changed its mind at the next legislative session.

Petitioners argue the Respondents' allegations in the origional complaint that the practice of requiring more contributions from women than men was violative of the 14th Amendment to the United States Constitution and Article One, Sections 1 and 21 of the California Constitution: "was rejected by all the courts". This argument was *not* rejected by all the courts because it was not pursued. Plaintiffs' objective was to obtain an equalization of retirement benefits under Federal law. This was accomplished. Plaintiffs in effect voluntarily dismissed their other causes of action brought under other laws.

Almost all the legal work was performed in regard to the Title VII issue. Other causes of action were dismissed by the Trial Court early in the litigation and were then not litigated by the plaintiffs except by way of cross-appeal to the Circuit Court of Appeals of the Ninth Circuit *after* defendants had appealed the summary judgment in favor of the plaintiffs on the Title VII issue. It was then held in appellate proceedings that dismissal of these causes of action was premature. The only work either set of attorneys did in regard to these causes of action consisted of some initial research and the cross-appeal. All other causes of action were dismissed by the District Court following the hearing on the application for attorney's fee on the basis of the voluntary statements of counsel that the decision of the United States Supreme Court make further pursuit of these causes redundant.

No more work was done by the attorneys for respondents because they asked for back pay than in connection with the establishment of the principle of law. They were, therefore, not compensated for any "extra work" done on the issue of the refund of back pay or other grounds for equalization of contributions.

In any event, under 42 U.S.C. Section 1988, the fact that plaintiffs have not prevailed on all issues does not, in itself, prohibit award of fees. Although a plaintiff may not sustain his entire claim, if a Judgment is rendered for him, he is the prevailing party. *Keyes v. School District* (1977, DC Colo.) 439 Fed. Supp. 393.

In order to be entitled to attorney's fees as a prevailing party, under 42 U.S.C. Section 1988, a plaintiff need not win all of its claims. Success on any of its substantial claims may entitle plaintiff to be considered as a prevailing party. *Croker v. Boeing Company* (1977, DC Pa.) 444 Fed. Supp. 890.

Plaintiffs did not prevail on the issue of a refund of contributions, not because of lack of merit in their position, but because of the Supreme Court's fear that its ruling might adversely affect the pension systems of other governmental agencies not so affluent as the Department of Water and Power of the City of Los Angeles. For example, the City of New York filed an amicus curiae brief.

(c) Special Circumstances. There Are None That Would Make an Award for Attorney's Fee Improper.

The Department argues that it was obliged to litigate the issue of whether or not the Title VII to the United States Supreme Court because it had to defend the claim for back pay. As previously stated, this is not correct. Since the benefits had already been equalized by State Law, the Department could well have conceded this principle under federal law and litigated only the back pay issue. Instead, it argued both matters all the way to the United States Supreme Court — and in fact still appears to be arguing both.

POINT TWO.

THE TRIAL COURT WAS NOT REQUIRED TO MAKE FINDINGS IN RESPONSE TO THE MOTION FOR ATTORNEYS' FEES, AND FINDINGS ARE NOT NECESSARY.

Rule 52(a) of the Federal Rules of Civil Procedure provides that

> "Findings of Fact and Conclusions of Law are unnecessary on decisions of motions under Rules 12 (Motion for Judgment on the Pleadings) or 56 (Motion for Summary Judgment) or any other Motion except as provided in Rule 41(b) (Involuntary Dismissal)."

Defendants quote from the Court's Opinion in the Tenth Circuit case of *Featherstone v. Barash*, 345 F.2d 246, 249 (10th Cir. 1965) wherein the Court said:

> "The purposes of this rule (regarding Findings of Fact and Conclusions of Law) are to aid the Appellate Court by affording it a clear understanding of the ground or basis of the decision of the Trial Court."

However, the *Featherstone* case was an original action for attorney's fees and did not involve a Motion for Attorney's Fee ancillary to a Civil Rights case. Of course, the provisions of Rule 52(a) requiring Findings of Fact and Conclusions of Law in a case tried without a jury, would apply to that case. That case has no relationship to the instant one.

In the case of *Kerr v. Screen Extras Guild, Inc.*, 256 F.2d 67, 69 (9th Cir. 1975) the Court declared that it was unable to determine the basis of the award for attorney's fee and therefore remanded the case for the limited purpose of making Findings of Fact and Conclusions of Law stating: "The matter can be covered by an opinion containing a recital of the facts and the guidelines considered in determining attorneys fees."

The Court concluded at page 70 of the Official Report: "We do not intend to express any opinion herein that the amount of fees previously awarded should or should not be changed."

In the instant case the criteria and guidelines for determining fees as they were itemized by Your Honorable Court in the *Kerr* case are present. Both sets of attorneys itemized the time and labor required, whether the fee was fixed or contingent, their customary fee, their experience, and the nature and length of their professional relationship with the client. The novelty and difficulty of the questions involved, the skill required to perform the legal service properly, and the amount involved and the results are apparent. The reputation and ability of the attorneys can be inferred by the Affidavits regarding their experience and were known to

the trial judge. The customary fee charged by attorneys in the area was elucidated by Affidavits or Declarations of three independent attorneys (Stuart L. Kadison, filed November 7, 1978; Stuart A. Benjamin, filed December 8, 1978; and Frank Rothman, filed December 8, 1978). Mr. Kadison, for example, stated that the customary hourly fee for a senior partner in an established law firm was $125 an hour. This fee would apply to Answering Respondents' attorney.

At the time of the hearing on attorney's fees the Trial Judge specifically stated as quoted by petitioner at page 9 of the Petition: "In fixing those fees, I, of course, am taking into account the reasonable time spent by the attorneys, the complexity of the issues, the skill and experience of the attorneys, the results obtained, and the need to adequately compensate lawyers to take on Title VII cases."

This, in the light of the record, is all the finding required or necessary.

POINT THREE.

THE FEES ALLOWED BY THE DISTRICT COURT WERE REASONABLE.

(a) Use of a Multiplier Is Justified.

Defendants argue that a multiplier should not have been applied because the section of the Civil Rights Act (42 U.S.C. Section 1988) which provides for the allowance of attorney's fee does not specifically refer to a multiplier, but merely uses the term "reasonable". The following paragraph appears at page 6 of the Senate Judiciary Committee Report on the Bill which put this section into effect:

> "It is intended that the amount of fees awarded under S.2278 be governed by the same standards which prevail in other types of equally complex Federal litiga-

tion, *such as antitrust cases*, and not be reduced because the rights involved may be nonpecuniary in nature." (emphasis added).

(b) No "Market Rate" Was Fixed for the Attorney for Those Answering Respondents.

Answering Respondents reiterate that their attorney handled this case on a semi-contingency basis. The agreement was that she would be paid fees as allowed by the Court to be paid by the defendant. She has received no fee to date and would receive no fee if Respondents had not been prevailing parties.

Under such an arrangement a multiplier is justified in a civil rights case.

(c) Services Billed and Paid for Now Are Compensable at Present Rates.

Petitioners complain that the hourly rates requested by the attorneys and considered by the trial court in fixing the fee were 1978 hourly rates although the work had been done in past years.

If petitioners had been paying for the services as they were performed, the attorney's fee at the time of the performance might be less than now requested. By the same token, the paid fee would have generated interest or other endeavors on the part of the attorneys.

As a matter of fact, the hourly rates now charged attorneys are higher than at the time the court fixed the fee in the instant case, and petitioners have no cause to complain because 1978 rates may have been considered at the time the fees were fixed.

One who buys a product today must pay today's price even if the materials were purchased and the labor performed in the past.

As a matter of fact, the petitioners in this case are obtaining a bargain — a fee fixed four years ago.

(d) All Work for Which the Undersigned Claims Compensation Is Legal Work Which a Lawyer Would Do and Be Expected to Do.

Petitoners argue that no distinction was made by the court as to the various types of work done by the attorneys. As the undersigned previously stated the work done in the instant case was done while she was a member of a comparatively small law firm and later as the sole practitioner. She did all of the work herself except for two hours done by her associate. The work for which she was ordered compensated included research, drafting of briefs, consultation with clients, co-counsel and opposing counsel, actuaries, insurance personnel and others, and attendance at court hearings in Los Angeles. The undersigned claimed reimbursement for hours at the hourly rate of $100 per hours and did not ask more for court appearances although such might have been justified.

Since the undersigned was doing all the work herself she well knew how many hours she had spent and it was not necessary that detailed hours be kept of work done by various others who may have performed work on the same case. Such a requirement would be appropriate in a large office where several attorneys are working on the same matter.

Petitioners argue there was duplication of effort on the part of two sets of attorneys. Duplication would imply that each set of attorneys did the same work for the same objective and such was not the case. There was consultation

and discussion between the two sets of attorneys as there might be between two lawyers in a law firm working on two aspects of the same case or among judges deciding a case.

POINT FOUR.

THE FEE ALLOWED BY THE COURT IN A CASE OF THIS KIND IS WITHIN ITS DISCRETION AND THERE WAS NO ABUSE OF DISCRETION.

Answering Respondents' attorney was retained by the parties who contacted her, solely on a contingency basis, specifically on the basis of any fees that might be awarded to her by the Court if her clients prevailed. If no fee is allowable to her, she will receive no fee for the work done. It has been repeatedly said that one of the factors to be considered in the determination of attorney's fee is whether the fee is fixed or contingent. Others are the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the experience, reputation and ability of the attorney, and the nature and length of the professional relationship with the client.

Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 2-106.

Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974);

Kerr v. Screen Extras Guild, 256 F.2d 69 (9th Cir. 1975) *supra*.

In *Kerr v. Screen Extras Guild, Inc.*, 256 F.2d 67, 69 (9th Cir. 1975) *supra*, Your Honorable Court stated:

> "The amount of attorney's fee to be awarded is, of course, within the discretion of the Trial Court, and will not be disturbed absent an abuse of discretion."

Assessment of reasonable fee under 42 U.S.C. Section 1988 in a particular case is within the sound discretion of

the Court; fees may be awarded for appellate work in Court of Appeals, and fees may be awarded for time spent litigating issues of fees. *Souza v. Southworth* (1977, CA1 RI) 564 F.2d 609.

(Of the total of 219¾ hours alleged, two hours and 55 minutes were spent on discovery proceedings conducted by defendants in regard to attorney's fee.)

Answering Respondents' attorney itemized her services and affirmed the time spent on various services. This itemization was not in the form of time sheets on a per day, per hour, per minute basis, but established the time expended.

In Affidavits, she outlines her previous legal activities. She graduated from the University of Michigan Law School in June 1937 and was admitted to practice law in the State of California on December 3, 1937. She related the various cases that she had handled, promoting the rights of women. She also commented on her past employment as Legislative Advocate for the California Federation of Business and Professional Women's Clubs, including successful passage of the so-called Wife's Paycheck Bill giving a married woman management and control of her earnings and the introduction of a Bill equalizing inheritance taxes on community property as between husbands and wives. She had represented THELMA CLARK in an action against the Department of Water and Power to obtain a reversal of the Rule that women employees of the Department had to retire at age 62 while men worked until age 65. Thelma Clark in turn was the daughter of a former chief of the Division of Industrial Welfare with whom the undersigned had worked on other women's rights matters. She was the attorney first contacted by the individual plaintiffs and the Committee to Protect Women's Retirement Benefits, including some of the women holding executive positions in the Department, in connection with the present problem.

All of these factors can properly be considered in determining the allowance of attorneys' fee to Answering Respondents' attorney.

Parenthetically, Answering Respondents believe Petitioners have spent more money in compensation of their own attorneys, in resisting the fee of Answering Respondents' attorney, than the $30,000 allowed her.

Conclusion.

Answering respondents agree with petitioners' statement on page 29 of the Petition that: "It is important that attorneys fees be made available to plaintiffs to encourage the vindication of Title VII rights so as to carry out the will of Congress." Petitioners, however, then argue that defendant's counsel should not be discouraged from proving a meritorious defense because his client, win or lose, will have to pay fees for both counsel. Petitioner is proposing a Catch 22 situation, contending in effect that, of course, attorneys should be allowed attorneys' fees for Title VII cases, but defendants should not have to pay such fees or they would be discouraged from defending the claim.

In this case, neither set of attorneys was allowed all the fee that was requested. The court fixed a fee based upon all the factors to be considered. The petitioners won on one point before the United States Supreme Court which is of lesser overall importance than the establishment of the general principle enunciated by your Honorable Court in its original decision.

WHEREFORE, answering respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

KATHERINE STOLL BURNS,

Attorney for Answering Respondents.

Opposition

2

FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1399

IN THE

Supreme Court of the United States

October Term, 1981

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD, LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ROBERT M. DOHRMANN, ESQ.,
MICHAEL R. FEINBERG, ESQ.,
SCHWARTZ, STEINSAPIR, DOHRMANN,
KREPACK, SOMMERS & EDELSTEIN,
The Equitable Plaza,
3435 Wilshire Boulevard,
Suite 2950,
Los Angeles, Calif. 90010,
(213) 739-7000,
Attorneys for Plaintiffs-Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Did the district court abuse its discretion by awarding plaintiff-respondent International Brotherhood of Electrical Workers, Local Union No. 18 ("IBEW") $135,000 in attorneys' fees in the instant case?

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No. 81-1399

IN THE

Supreme Court of the United States

October Term, 1981

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE.

Plaintiffs-respondents filed their Complaint in this case on September 26, 1973, alleging that the use of sex

segregated mortality tables by the Department of Water and Power ("Water and Power") to determine employee contributions to its pension plan violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1) and (a)(2); the Civil Rights Act of 1871, 42 U.S.C. § 1983; the fourteenth amendment to the United States Constitution; and article I, sections 1 and 21 of the California Constitution (section 21 is now embodied in section 7(d)).

On January 15, 1975, the District Court for the Central District of California issued a preliminary injunction under Title VII prohibiting defendants from requiring larger pension plan contributions from individual female employees than from similarly situated individual male employees. (Previously, on March 26, 1974, the court dismissed plaintiffs' non-Title VII causes of action in its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss.)

On December 26, 1974, while the district court's Opinion was in draft form, defendants notified the court that they "had adopted a resolution on December 23, 1974, equalizing male and female employee contributions to the Retirement Plan." The resolution was effective January 1, 1975, the same date as California Government Code, § 7500, which made it unlawful for a municipal pension and retirement system to require greater contributions from employees of one sex than from employees of another sex who are the same age.

The district court issued a permanent injunction on June 20, 1975, enjoining defendants from requiring female employees to make larger contributions to its pension plan than their male counterparts. The court also ordered defendants to refund to class members contributions female employees were required to make to the pension plan in excess of contributions required from similarly situated male employees on and after April 5, 1972. *Manhart v. City of Los Angeles, Dep't of Water and Power*, 387 F.Supp. 980 (C.D. Cal. 1975).

Defendants appealed from both portions of the permanent injunction. The Ninth Circuit Court of Appeals, on November 23, 1976, affirmed in whole the judgment of the district court (amended December 23, 1976). A petition for rehearing was denied. 553 F.2d 581 (9th Cir. 1977).

On April 25, 1978, the Supreme Court affirmed the portion of the district court's judgment prohibiting the use of sex-segregated actuarial tables to determine employee contributions to pension plans. In light of the fact that this was a case of first impression, and because of the potential impact a refund of contributions would have on pension funds across the country, the Court declined to order such a refund. *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978).

Pursuant to section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), plaintiffs moved for attorneys' fees and an evidentiary hearing was held in the district court on February 1, 1979. The court heard live testimony from counsel for IBEW and counsel for the remaining plaintiffs, and received a total of 13 affidavits and declarations into evidence. Said affidavits, *inter alia*, contained as exhibits all time and billing records prepared by IBEW's legal counsel during the course of the entire *Manhart* litigation, attested to the background of counsel for IBEW, the high quality of legal services performed and the value of these services measured by standards in the Los Angeles legal community, and the importance and wide-spread impact of the Supreme Court's opinion.

At the conclusion of the evidentiary hearing, the district court awarded counsel for IBEW $135,000 in attorneys' fees. The court clearly stated on the record the factors it considered in making this award. These included the reasonable time spent by counsel, the complexity of the issues, the skill and experience of IBEW attorneys, the results obtained and the need to adequately compensate lawyers for prosecuting Title VII cases.

The district court's award of attorneys' fees to plaintiffs was affirmed by the Ninth Circuit on August 7, 1981, 652 F.2d 904 (9th Cir. 1981); and a rehearing was denied on November 16, 1981. No judge of the court of appeals requested a vote on defendants' suggestion for rehearing *en banc*. Defendants filed a petition for writ of certiorari on January 22, 1982.

THIS CASE PRESENTS NO SPECIAL CIRCUMSTANCES WARRANTING A DENIAL OF ATTORNEYS' FEES.

In *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975), the Court ruled that in cases brought under Title VII of the 1964 Civil Rights Act, attorneys' fees should "ordinarily" be awarded — *i.e.*, in all but "special circumstances" — to plaintiffs who are successful in obtaining injunctions against unlawful employment discrimination. The burden of proof is on the losing defendant to show such "special circumstances", *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980); *Mid-Hudson Legal Services, Inc. v. G&U, Inc.*, 578 F.2d 34, 38 (2d Cir. 1978); a burden defendants herein have failed to carry.

A. The Refusal of the Supreme Court to Award Plaintiffs a Refund of Excess Contributions Is Not Indicative of Special Circumstances nor Does It Mean That Plaintiffs Did Not Prevail, and Should Not Mitigate Against an Award of Reasonable Attorneys' Fees.

Defendants claim this Court's denial of an award of retroactive monetary relief is indicative of the "special circumstances" warranting denial of attorneys' fees to plaintiffs. A review of both the Supreme Court's *Manhart* opinion and the "special circumstances" exception to the routine award of attorneys' fees as set forth in *Albermarle* requires quite a different conclusion.

In *Albermarle*, the Court adopted, as the exception to the routine award of attorneys' fees in Title VII cases, the

"special circumstances" concept first enunciated in *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (a case brought under Title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000a-3(a)): successful plaintiffs "should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." *Albermarle*, 422 U.S. at 415. In adopting this rule for use in Title VII cases, however, this Court distinguished between the criteria for denying attorneys' fees to plaintiffs who had been successful in obtaining injunctive relief and the criteria for denying backpay to plaintiffs who had successfully shown unlawful discrimination, stating, "For guidance as to the granting and denial of *backpay*, one must . . . look elsewhere." 422 U.S. at 415 (Original emphasis).

The Court then established a separate and distinct guide to the award or denial of backpay: ". . . given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421.

These considerations are clearly different from those applied in awarding attorneys' fees, where the key concern is to encourage persons injured by discrimination to seek judicial relief and thus secure enforcement of the Civil Rights Acts, *Newman*, 390 U.S. at 402. Therefore, this Court's denial of retroactive monetary relief in *Manhart*, does not, as defendants incorrectly claim, indicate a finding of "special circumstances" as part of the "law of the case".

Defendants have further argued that because this Court denied the refund of excess contributions, plaintiffs were not the prevailing parties in this case. An examination of the Court's rationale for refusing to order a refund of contributions, however, leads to the ineluctable conclusion that

plaintiffs were the prevailing parties in *Manhart* and that they are entitled to their reasonable attorneys' fees.

This Court gave two reasons for denying a refund of excess contributions in *Manhart*. First, the Court pointed out that its decision represented "a marked departure from past practice." 435 U.S. at 722. Thus, the majority reasoned that:

> Although we have no doubt about the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful. The courts had been silent on the question, and the administrative agencies had conflicting views. [Footnote omitted.] The Department's failure to act more swiftly is a sign, not of its recalcitrance but of the problem's complexity.

435 U.S. at 719-720.

Second, and most important, the Court pointed out that "retroactive liability could be devastating for a pension fund." 435 U.S. at 722. Although, as this Court itself recognized, the award of excess contributions in the instant case was relatively insubstantial, it concluded that "we cannot base a ruling on the facts of this case alone." 435 U.S. at 722 n.42. Rather, the Court was concerned that if its decision triggered substantial pension fund liability across the nation:

> . . . the administrators of the fund will be forced to meet unchanged obligations with diminished assets. [Footnote omitted.] If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contributions of past employees.

435 U.S. at 723.

Thus, the denial of a refund of excess contributions had nothing to do with this Court's view of the *merits* of plaintiffs' case. Although denying said refund, the Court affirmed the district court's finding of unlawful discrimination and left untouched the district court's injunction against future discrimination. It is well-established that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978). *Accord: Hanrahan v. Hampton*, 446 U.S. 754, 757-758 (1980).

Defendants claim that plaintiffs are not the prevailing parties because they have allegedly failed to achieve any of the benefits sought by their lawsuit. The emptiness of this argument is shown in the Ninth Circuit's ruling (Appendix A) on the appeals costs (which ruling has not been appealed to this Court):

> In this case, the plaintiffs have won a victory, in that they established the rule that they sought in a case of first impression. They have been denied a monetary recovery, not because the rule that they established would not have entitled them to the recovery in the ordinary case, but only because, the matter being one of first impression, the Supreme Court felt that it would be better not to apply the rule retroactively. . . . [W]e conclude that the plaintiffs should recover their costs. . . . Otherwise, the plaintiffs' victory would have been illusory, in that they would have established a rule of law for which they contended and as their reward found themselves subjected to a liability for costs.

Based on this reasoning, the Ninth Circuit found that plaintiffs were the prevailing parties and awarded them ap-

peals costs under Rule 39 of the Federal Rules of Appellate Procedure.[1]

Defendants further assert that the January 15, 1975 preliminary injunction obtained by plaintiffs was of no practical value to them because defendants had adopted a resolution on December 23, 1974, equalizing male and female employee contributions to the Retirement Plan, allegedly making plaintiffs' lawsuit moot. This is incorrect. At no time was the thrust of plaintiffs' lawsuit so limited. Plaintiffs sought and obtained a broad judicial declaration of their rights under Title VII. Indeed, this Court's decision not only struck down defendants' practice of sex discrimination, but also disapproved of other sex-based practices available to defendants. Specifically, it foreclosed defendants' option of equalizing male-female contributions, but providing women with lower monthly benefits after retirement. This kind of discrimination was not uncommon when the Court handed down its decision. *See, e.g., Henderson v. Oregon*, 405 F.Supp. 1271 (D. Ore. 1975), *remanded*, No 76-1706 (9th Cir. 1978). The case at bar is therefore on point with *Rosenfeld v. Southern Pacific Co.*, 519 F.2d 527, 529 (9th Cir. 1975), wherein the court held that "even though [the Title VII plaintiff-] appellee's prayer for damages was denied, she prevailed on the merits and obtained *declaratory and injunctive relief*. She was therefore a 'prevailing party' to whom attorneys' fees may be awarded." (Emphasis added.) As noted in *Perkins v. New Orleans Athletic Club*, 429 F.Supp. 661, 667 (E.D. La. 1976), "this is not a case where the plaintiff recovered nothing, [citation omitted] or a pittance. The plaintiff obtained substantial relief. . . . Hence it must be concluded that the plaintiff was the prevailing party. . . ."

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[1]Under § 706(k) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), attorneys' fees are awardable as costs.

Defendants state that "where a plaintiff is not entitled to any relief *at the time the suit was brought*, she is not a 'prevailing party' under Title VII even though she may prove she was in fact discriminated against." (Emphasis added.)[2] Plaintiffs herein were, even by defendants' present reckoning, entitled to relief *when their lawsuit was filed* as is evidenced by this Court's finding of unlawful discrimination and the Ninth Circuit's affirmance of the injunctive order.

As a last effort to show "special circumstances" warranting a denial of attorneys' fees, defendants rely upon *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387 (7th Cir. 1975); and *Scheriff v. Beck*, 452 F.Supp. 1254 (D. Colo. 1978). None of these cases are on point. In *Chastang*, retired male employees brought suit for damages, alleging sex discrimination in a pension plan which gave male employees a smaller share in their vested interests in the pension fund than similarly situated females. The Fourth Circuit affirmed the trial court's finding of unlawful discrimination

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[2]Defendants cite two cases in support of their position: *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192 (6th Cir. 1978), cert. den. 441 U.S. 932 (1979), and *Inmates of Nebraska, etc. v. Greenholtz*, 567 F.2d 1381 (8th Cir. 1977), affirming 436 F.Supp. 432 (D. Neb. 1976). In *Harrington*, the plaintiff established unlawul discrimination in working conditions, but not with regard to her salary, nor did she establish that she was constructively discharged by her employer. The court found that there was no relief available for a claim of discrimination in working conditions, standing alone, and the plaintiff did not prevail with regard to the issues of constructive discharge and salary. The court therefore found her not to be a "prevailing party" as she was not entitled to *any* relief. Indeed, this case holds that to be a prevailing plaintiff, she must have been entitled to relief "at the time she commenced the District Court action." 585 F.2d at 197.

Greenholtz teaches us nothing. A district court found certain plaintiffs to be prevailing parties and, under 42 U.S.C. § 1988, awarded plaintiffs their costs, but declined to award attorneys' fees. No reason for the distinction in the treatment of costs and attorneys' fees was given. 436 F.Supp. at 443. The Eighth Circuit approved the district court decision, without commenting on the basis of the denial of attorneys' fees. 567 F.2d at 1384.

against male employees, but denied attorneys' fees to the plaintiffs. The important factor considered by the appeals court was that the defendant "had no right unilaterally to alter the [discriminatory] schedule of benefits." 541 F.2d at 1045. Such a special circumstance is inapplicable to the case at bar, where defendants admittedly had the power to unilaterally amend the retirement plan so as to eliminate unlawful discrimination. Further, as defendants themselves note, the disputed pension plan in *Chastang* was amended six months before the plaintiffs brought their lawsuit. The plaintiffs therein were therefore in the same position as the plaintiff in *Harrington v. Vandalia-Butler Board of Education, supra*, since at the time they commenced their lawsuit they were not entitled to prospective relief. Thus, although the *Chastang* court does not so state, the plaintiffs therein were not true "prevailing parties" within the meaning of § 706(k).

At first glance, *Sprogis* appears to bear some similarity to the instant case. The plaintiff's Title VII lawsuit was sponsored by her union, which was a real party in interest which had initiated the lawsuit. The union agreed to bear the cost of the litigation, and the named plaintiff bore no financial responsibility for attorneys' fees or costs. Indeed, attorneys' fees were requested to be paid not to the plaintiff, but to her union. 517 F.2d at 390. A careful examination of *Sprogis*, however, reveals that the similarities are only superficial.

Prior to the filing of the *Sprogis* lawsuit, the union and the defendant employer had reached a settlement agreement on the issue of the employer's "no-marriage" rule for female stewardesses: the union agreed to withdraw its grievances and EEOC charges, and the employer agreed to revoke its discriminatory policy. Nonetheless, plaintiff and her union proceeded with their "test" case. Although the appeals court admitted that this was not improper, it found that the union had used the lawsuit as a vehicle to circumvent

the substance of its settlement agreement with the employer. Also, the union never revealed its interest in the case prior to its application for attorneys' fees. Because the employer had not known of the union's position and might have had a different strategy if it had, the court held it to be unfair to assess fees against it. 517 F.2d at 390-391.

In the instant case, no such unfair conduct on the part of IBEW has or can be shown. IBEW, an organization whose purpose is to represent Water and Power employees through collective bargaining, was carrying out its responsibility to all of its members to assure that the retirement plan was not sexually discriminatory. Defendants can point to no action on the part of plaintiffs by which they have been prejudiced.

Defendants' third example of "special circumstances" is *Scheriff v. Beck*, in which a plaintiff won a § 1983 lawsuit against a town marshall and town building inspector with regard to the defendant's unlawful arrest of the plaintiff, use of excessive force in making such arrest, and false statements in support of the illegal arrest. Attorneys' fees were denied, however, where the civil rights violation was found to have been precipitated by an "irrational deliberate scheme" of plaintiff to involve defendant building inspector in some type of litigation and where plaintiff had engaged in "outrageous" conduct over several months. 452 F.Supp. at 1260. Clearly, the actions of plaintiffs herein in no way correspond to the conduct of the plaintiff in *Scheriff*.

B. Defendants' So-Called "No-Win" Position Does Not Constitute a "Special Circumstance" Justifying the Denial of Attorneys' Fees.

Defendants claim that their "special circumstances" arose from the fact that they were in a "no-win" position, that they were faced with two major obstacles to terminating the lawsuit at an early stage: (1) their fiduciary obligations as trustees of a pension fund to protect the assets of the fund, and (2) the strong possibility that male employees

would pursue an opposing position under Title VII, thus subjecting defendants to conflicting liabilities.

The first point is quite simply irrelevant. Although it is true that a "fair adversary process presupposes both a vigorous prosecution and a vigorous defense," *Christiansberg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1977), it is equally valid that "those who elect a militant defense in the face of a statute allowing attorneys' fees if they are defeated must take into account the time and effort they exact from their opponents." *Perkins*, 429 F.Supp. at 667. That defendants may have relied upon State law in originally establishing their discriminatory pension plan is no bar to an award of attorneys' fees to prevailing plaintiffs. *Rosenfeld*, 519 F.2d at 530. Moreover, the mere fact that defendants were operating in a "murky area of the law" is not a "special circumstance" justifying rejection of a statutory award of attorneys' fees in a civil rights case. *Northcross v. Board of Education*, 611 F.2d 624, 635 (6th Cir. 1979), *cert. den.* 447 U.S. 911 (1980).

With regard to the second point, defendants point to an employment discrimination charge filed against Water and Power by the Engineers and Architects Association ("E.A.A.") on November 15, 1972. (Appendix G to Defendants' Petition for Writ of Certiorari, p. 27.) The charge alleged that the Retirement Plan discriminated against male employees by requiring males to pay greater pension contributions than their female counterparts.

As is obvious from the facts in *Manhart*, this allegation was simply incorrect, a fact which defendants must certainly have known. The Retirement Plan discriminated not against male employees but against *female* employees in that it collected greater contributions from female employees than from male employees during the term of active employment. As this charge was based upon unquestionably erroneous allegations, defendants could not have been significantly concerned about conflicting liabilities.

Defendants' arguments are reminiscent of those raised by the defendant in *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970), where the plaintiffs, Title II litigants who had prevailed against an amusement park on a race discrimination charge, sought attorneys' fees. The defendant raised "special circumstances" as a defense, claiming " (i) Defendant raised no frivolous defenses or issues, (ii) its contentions were put forward in subjective good faith (i.e., believed to be meritorious), . . . (iii) several judges agreed with these contentions along the way," and (iv) there was no showing that plaintiffs were obligated to pay attorneys' fees. To these claims the court responded, "None of these circumstances can be denominated a special circumstance. The first and third — that a controversy existed, and that facts proved it to be a non-frivolous controversy — are certainly not unusual in a lawsuit. They are the stuff suits are made of. The second — Appellee's good faith — was specifically rejected as a special circumstance in *Newman*." 426 F.2d at 538. The *Miller* court further found that the absence of an obligation on the part of plaintiff to pay attorneys' fees is not a "special circumstance", as such obligation is not required. "Rather what — and all — that is required is the existence of a relationship of attorney and client, a status which exists wholly independently of compensation, as witness the effective service of counsel in the defense of criminal cases, the assertion of post-conviction habeas remedies and the now widespread organized services on behalf of the poor." 426 F.2d at 538-539.

In sum, there has been absolutely no showing by defendants, nor can there be, of "special circumstances" warranting the denial of attorneys' fees to plaintiffs, the prevailing parties in the instant case.

THE DISTRICT COURT PROPERLY CONSIDERED THE FACTORS NECESSARY TO AWARDING PLAINTIFFS' COUNSEL REASONABLE ATTORNEYS' FEES. FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE NOT REQUIRED.

The determination of attorneys' fees to be awarded in Title VII cases, as in other cases where the amount is not fixed by statute or contract, is based on a consideration of a variety of factors. In *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1322 (7th Cir. 1974), the court outlined the proper analysis to be engaged in by a district court:

> In fashioning a method of analysis to assist in determining the amount of attorneys' fees properly to be awarded in a Title VII action, we cannot subscribe to the view that attorney fees are to be determined solely on the basis of a formula applying "hours spent times billing rate." We recognize that such a factor is a consideration in making the ultimate award and *it is a convenient starting point from which adjustments can be made for various other elements.*

(Emphasis added.)

A comprehensive list of the "other elements" to be used as "guidelines" in determining the reasonable amount of attorneys' fees to be awarded in a Title VII action was set forth in the oft-cited case of *Johnson v. Georgia Highway Express Co., Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), as follows:

(1) The time and labor required;

(2) The novelty and difficulty of the questions;

(3) The skill requisite to perform the legal service properly;

(4) The preclusion of other employment by the attorney due to acceptance of the case;

(5) The customary fee;

(6) Whether the fee is fixed or contingent;[1]

(7) Time limitations imposed by the client or the circumstances;

(8) The amount involved and the results obtained;

(9) The experience, reputation, and ability of the attorneys;

(10) The "undesirability" of the case;

(11) The nature and length of the professional relationship with the client; and

(12) Awards in similar cases.

The Ninth Circuit adopted the *Johnson* criteria in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (1975), *cert. den. sub nom. Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 951 (1976), stating, "these guidelines are consistent with those recommended by the Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 2-106."

The record herein clearly reveals that the district court based its attorneys' fees award on appropriate considerations. The court's own description of the rationale it used to determine the amount of attorneys' fees awarded is as follows:

> [The Court:] First of all, I have to preface my remarks by stating that the plaintiff in this case, Ms. Manhart, was the prevailing party, and that counsel are entitled to reasonable fees.
>
> *In fixing those fees, I, of course, am taking into account the reasonable time spent by the attorneys, the complexity of the issues, the skill and experience of the attorneys, the results obtained, and the need to adequately compensate lawyers who take on Title VII cases.*
>
> I have not sat down with a calculator and gone over each hour, and made a determination on an hour-by-

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[1] *But see Clark v. Am. Marine Corp.*, 320 F.Supp. 709, 711 (E.D. La. 1970), *aff'd.* 437 F.2d 959 (5th Cir. 1971).

> hour or minute-by-minute basis applying to that time a reasonable hourly rate.
>
> I think that approach, which is mechanical, can lead, in some cases, to an unfair conclusion.
>
> What I am saying is this: That based on my experience with the case, and based on my consideration of these relevant factors that I have outlined, I think that for Mr. Dohrmann's firm a reasonable fee is the sum of $135,000.

R. 66, *Manhart* (February 1, 1979). (Emphasis added.)

These factors are also reflected in the district court's Order awarding attorneys' fees. The Ninth Circuit found this analysis sufficient in its decision below. 652 F.2d at 908.

The fact that the district court did not make specific findings of fact and conclusions of law is not sufficient reason to overturn the court's fee award. Indeed, findings of fact and conclusions of law are not required to support an award of attorneys' fees under § 706(k) of Title VII:

> . . . Rule 52(a) [of the Federal Rules of Civil Procedure] does require findings of fact and conclusions of law in actions tried without a jury, but, in its last sentence, it exempts "decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." The fee award was sought by motion under the provisions of § 706(k) of Title VII. It is one of the "other motions" exempted from the requirements of Rule 52(a), and the absence of findings does not require reversal.

Lea v. Cone Mills Corp., 467 F.2d 277, 278 (4th Cir. 1972).

Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978), relied upon by defendants, is distinguishable from the instant case. *Fountila* involved an action under the Fair Housing Act (42 U.S.C. § 3601 *et seq.*) and the Civil Rights Act of 1866 (42 U.S.C. § 1982). In reviewing the various criteria for an attorneys' fee award, the court found that:

> The record on this appeal does not indicate which of the above factors, if any, were taken into account by the district court in determining the amount of the attorneys' fees awarded. In this posture, a "meaningful review is impossible." *Kerr, supra* at 70. On the retrial of this case, therefore, the district court should issue findings of fact and conclusions of law with respect to its award of fees and make any appropriate adjustments to the award under the criteria we have discussed. 571 F.2d at 496-497.

In the instant case, the district court clearly stated on the record its basis for awarding attorneys' fees. Inasmuch as a prevailing Title VII plaintiff should receive attorneys' fees "almost as a matter of course," *Dawson v. Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979); plaintiffs submit that the district court's statement herein was sufficient to support the award. Indeed, this case is analogous to *Buxton v. Patel*, 595 F.2d 1182, 1185 n.2 (9th Cir. 1979), where the court stated:

> . . . although the District Judge made only a brief statement at the hearing on attorneys' fees, sufficient indication of the factors before the court appears in the record for us to conclude that the court did not abuse its discretion. Reconsideration is unnecessary. *Accord, Zarcone v. Perry, supra*, 581 F.2d [1039 (2nd Cir. 1978)] at 1045.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING IBEW'S COUNSEL "REASONABLE ATTORNEYS' FEES" IN EXCESS OF THOSE PAID BY PLAINTIFFS.

In 1976, Congress enacted the Civil Rights Attorney's Fees Awards Act, Pub.L. No. 94-559, 90 Stat. 2641, *amending* 42 U.S.C. § 1988. The purpose of this new Act, like Section 706(k) of Title VII, is to insure that plaintiffs suffering discrimination can attract competent counsel by awarding reasonable compensation. Because the purpose of these two Acts is identical, the 1976 Act is relevant to

computing fees under Title VII. *See, Roadway Express, Inc. v. Piper*, 447 U.S. 752, 785 n.5 (1980).

The legislative history of the 1976 Attorney's Fees Act reveals that Congress intended courts to award fees above normal hourly rates in appropriate circumstances. The following paragraph appears in the Senate Judiciary Committee Report on the bill:

> It is intended that the amount of fees awarded under S.2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, *such as antitrust cases*, and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' *Davis, supra; Stanford Daily, supra*, at 684.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6. (Emphasis added.)

The most important language in this quote is the phrase, "such as antitrust cases." This reference shows that under § 1988 it is appropriate to afford successful plaintiffs a "multiplier" of the reasonable hourly rate. In the leading antitrust attorneys' fees case of *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator and Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), the Third Circuit suggests that a district court first determine fees in terms of a

"lodestar" (the reasonable hourly rate multiplied by the number of hours reasonably expended on the lawsuit, 487 F.2d at 167), and then make an upward adjustment of this sum in light of the "contingent nature of success" and the "quality of representation" by plaintiff's attorneys.

The *Lindy* criteria for adjusting attorneys' fees upward from the "lodestar" sum, were adopted in the Title VII context in *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980), the court of appeals elaborating as follows:

> It is important to recognize that the contingency adjustment is designed solely to compensate for the possibility at the outset that the litigation would be unsuccessful and that no fee would be obtained. Contingency adjustments of this sort are entirely unrelated to the "contingent fee" arrangements that are typical in plaintiffs' tort representation. In tort suits, . . . the fee is directly proportional to the recovery. Such is not the case in contingency adjustments of the kind we describe herein. The contingency adjustment is a percentage increase in the "lodestar" to reflect the risk that no fee will be obtained. The contingency adjustment is *not* a percentage increase based on the amount of recovery. *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975).

641 F.2d at 893. And:

> Next the "lodestar" may be adjusted up or down to reflect "the quality of representation." . . . A quality adjustment is appropriate only when the representation is unusually good or bad, *taking into account the level of skill normally expected* of an attorney commanding the hourly rate used to compute the "lodestar."
>
> . . . Where exceptional results are obtained — taking into account the [reasonable] number of hours expended — an increase in fee is justifiable. . . . An upward award is appropriate only when the attorney

> performed exceptionally well or obtained an exceptional result for the client.

641 F.2d at 893-894. (Original emphasis.)

In addition to the important reference to antitrust cases in the passage from the Senate Judiciary Committee Report quoted above, and the adoption of the antitrust multiplier in the Title VII context by *Copeland*, it should be noted that in two of the cases cited by the Senate Committee "bonus awards" to attorneys were found appropriate. The first is *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), *rev'd on other grounds*, 404 U.S. 625 (1979), a Title VII action in which the court found a "bonus award" appropriate based on the inherent difficulty of the case and the "excellent results" achieved for the plaintiffs and the represented class.

Likewise, in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *rev'd on other grounds*, 436 U.S. 547 (1978), the court awarded plaintiff's counsel a $10,000 bonus due to the contingent nature of the compensation, the quality of the attorney's work, and the results obtained by the litigation.

In *Buxton v. Patel*, the Ninth Circuit approved, in principle, counsel's right to a bonus award in certain instances. Although affirming the denial of fees under the 1976 Attorney's Fees Act, the court quoted with approval the following language from the Second Circuit's opinion in *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), *cert. den.* 439 U.S. 1072 (1979):

> ". . . when the claim involves civil rights of broad significance, prosecuted on behalf of a large class, and the prospective monetary award, if the suit is successful, would be modest in relation to the time, effort and skill required of counsel, the district court must weigh these factors in determining whether to award [attorneys'] fees. *In such a case the prospect of an award supplementing the fees that the successful plaintiff*

> *might be able to pay would be essential to attract competent counsel.* Other factors entitled to consideration are the size of the benefits conferred by the suit on the public or on others, the amount of any fund created by the litigation (and its adequacy to cover the plaintiffs' costs and compensate him for actual damages), the presence or absence of any bad faith or obdurate conduct on the part of either party, and any unjust hardship that a grant or denial of fee-shifting might impose."

595 F.2d at 1185. (Emphasis added.)[4]

Plaintiffs submit that under the principles outlined in the above cases, there are several factors justifying the district court's award of fees over and above those paid to counsel. These factors are:

1. This Court's opinion constituted a major statement striking down the stereotypical treatment of women and requiring that they be treated as individuals rather than as members of a sexual class.

2. As the Supreme Court itself stated, this was the first litigation challenging pension fund contribution differences based on valid actuarial tables and "the prohibition against sex-differentiated employee contributions represent[ed] a marked departure from past practice." 435 U.S. at 722.

3. The *Manhart* decision has had widespread application across the United States. As this Court was careful to point out, millions of Americans participate in retirement

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[4]Defendants' reliance on *Oliver v. Kalamazoo Bd. of Educ.*, 576 F.2d 714 (6th Cir. 1978) is misplaced. In *Oliver*, plaintiffs were awarded attorneys' fees incurred in a school desegregation case. In calculating the fees, the district court used a multiplier. The court of appeals, however, because it could find no statutory or decisional authority supporting the multiplier, held the lower court had abused its discretion. To the contrary, there is both statutory and decisional authority supporting "bonus awards" in Title VII cases. *See, e.g., Lockheed Minority Solidarity Coalition v. Lockheed Missiles and Space Co., Inc.*, 406 F.Supp. 828 (N.D. Cal. 1976).

plans other than Social Security and the assets held in trust for these employees are more than $400 billion and are increasing by almost $50 billion a year. 435 U.S. at 721. The large number of similar lawsuits pending in the various courts throughout the United States attests to the fact that many of these plans likewise are based on now impermissible sexual classifications.

4. Although this Court denied a refund of excess contributions, it did so only because of the decision's significant departure from existing case law and the potentially devastating impact such a refund would have on pension funds across the country.

5. The *Manhart* decision not only struck down defendants' practice, but also disapproved of other sex-based practices available to defendants. By holding that Title VII does not contain a "cost-justification defense to a charge of sex discrimination," 435 U.S. at 716-717; the Court foreclosed defendants' option of equalizing male-female contributions but providing women with lower monthly benefits after retirement. As noted above, this kind of discrimination was not uncommon when the Court handed down its ruling. *See, e.g., Henderson v. Oregon, supra.*

6. The work performed by plaintiffs' counsel was of high quality and both persuasive and effective. Indeed, this Court, in finding that administrators of the pension plan may have assumed the use of sex-segregated tables was lawful, specifically noted that these administrators "did not have the benefit of the extensive briefs and arguments presented to us. . . ." 435 U.S. at 720.

7. The issue litigated was extremely complex in that it involved statutory and administrative interpretations of Title VII and of the Equal Pay Act of 1964, 29 U.S.C. § 206(d). This necessitated a detailed analysis of the sex discrimination provisions of Title VII (section 703(a)(1)(2)); the equal protection clause of the fourteenth amendment; the *bona fide* occupational qualification defense to sexually

discriminatory practices under Title VII (section 730(e)); the relationship of the Equal Pay Act to Title VII under the Bennett Amendment (section 703(h)); the colloquy between Senators Randolph and Humphrey on the Senate floor during debate on Title VII which had been approved by this Court in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); and a variety of sometimes conflicting interpretative bulletins and guidelines issued by the Labor Department and the Equal Employment Opportunity Commission (EEOC).

8. The *Manhart* decision has had a widespread impact. On August 25, 1978, the Wage and Hour Division of the United States Labor Department announced its intention to amend Interpretive Bulletin 800.116(d) (29 CFR § 800.116(d)), which permitted unequal male and female benefit plan contributions if the plan provided equal benefits to both sexes. 43 Fed.Reg.38029 (1978). This bulletin was one of the chief documents relied on by defendants during this litigation. The express purpose of the Labor Department's proposed amendment was to bring its position on fringe benefits under the Equal Pay Act into line with *Manhart*, 43 Fed. Reg. at 38031. Prior to the publication of the amended rules in final form, however, the responsibility for enforcement of the Equal Pay Act was transferred to the EEOC.

On September 1, 1981, the EEOC issued its own proposed replacement for Interpretative Bulletin 800.116(d), which provides in pertinent part at § 1620.5, as follows:

> (b) It shall be unlawful for an employer to discriminate between men and women with regard to fringe benefits [defined as including "retirement benefits"].

And:

> (e) It shall not be a defense under the Act to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

> (f) It shall be unlawful for an employer to have a pension or retirement plan which . . . differentiates in benefits on the basis of sex.

46 Fed. Reg. 43848, 43851 (1981). In its comments to the proposed regulations, the EEOC stated, "With respect to the last sentence in . . . [§]1620.5, the principles enunciated are mandated by *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978) and must be implemented." 46 Fed. Reg. at 43849.

With regard to the size of the attorneys' fee award, a review of the record herein leads to the inescapble conclusion that the attorneys' fees awarded by the district court were eminently reasonable. Specific evidence in the record includes affidavits and declarations submitted on behalf of plaintiffs' counsel by highly respected lawyers in the Los Angeles area. We submit that the district court did not abuse its discretion in awarding attorneys' fees over and above those paid by the IBEW. Section 706(k) entitles counsel to "a reasonable attorneys' fee", and the district court's award was reasonable in light of the standard rate charged for similar work in the community by lawyers of comparable experience.

PLAINTIFFS ARE ENTITLED TO BE COMPENSATED FOR ALL LEGAL WORK REASONABLY CALCULATED TO ADVANCE THEIR INTERESTS — INCLUDING WORK ON NON-TITLE VII ISSUES WHERE PLAINTIFFS DID NOT PREVAIL.

Defendants claim that plaintiffs, if entitled to attorneys' fees at all, are not entitled to be compensated for time spent on non-Title VII matters because they did not prevail on such issues. Once again, defendants' argument does not comport with applicable law.

The propriety of awarding attorneys' fees for time spent on issues where plaintiffs did not ultimately prevail was thoroughly discussed in the recent decision in *Northcross v. Board of Education, supra*, 611 F.2d 624, cited with approval by defendants. The district court had concluded

that the plaintiffs in the *Northcross* school desegregation case were the "prevailing parties", thus entitling them to attorneys' fees. However, it then concluded that those fees could be cut because the plaintiffs had *not* prevailed on some "issues or parts of issues." The court of appeals disagreed, holding that:

> Once . . . [the "prevailing party"] . . . issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events, is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith. There are numerous practical reasons why a court may not be permitted to dissect a lawsuit into "issues and parts of issues as to which the plaintiffs did not prevail," especially by decimating the total hours claimed with arbitrary percentages. Suffice it to say, however, that Congress has mandated that a prevailing party's attorney should be compensated "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." We know of no "traditional" method of billing whereby an attorney offers a discount based upon his or her failure to prevail in "issues or parts of issues." Furthermore, it would hardly further our mandate to use the "broadest and most flexible remedies available" to us to enforce the civil rights laws if we were so directly to discourage innovative and vigorous lawyering in a changing area of the law. That mandate is best served by encouraging attorneys to take the most advantageous position on their clients' behalf that is possible in good faith. The

> fact that these lawyers advocated a . . . remedy of broader scope and faster pace than was ultimately adopted cannot be considered to be unreasonable. Their clients have prevailed. . . .

611 F.2d at 636. *Accord: Copeland, supra*, 641 F.2d at 892 n.18.

The same issue was similarly discussed by the district court in a supplemental opinion in *Stanford Daily, supra*. In granting fees incurred in preparing a motion for a preliminary injunction which was denied, the court stated that:

> Some federal court decisions reason that hours spent on the litigation of unsuccessful claims should be deducted from the number of hours upon which an attorneys' fee award is computed. [Citations omitted.] *However, several recent decisions, adopting a different tack, deny fees for clearly meritless claims but grant fees for legal work reasonably calculated to advance their clients' interests.* These decisions acknowledge that courts should not require attorneys' (often working in new or changing areas of the law) to divine the exact parameters of the courts' willingness to grant relief. [Citation omitted.]
>
> . . . Plaintiffs' attorneys obviously were not manufacturing legal services in constructing their preliminary injunction motion. They did not secure the full, injunctive relief which they originally requested, but they did obtain a significant concession from defendants as a result of their motion. In the process, they substantially advanced their clients' interests. The court finds that the attorney time spent on this motion . . . should be counted in determining a proper award.

64 F.R.D. at 684 (Emphasis added.)[5]

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[5]*See also Richardson v. Civil Serv. Comm'n*, 449 F.Supp. 10, 11-12 (S.D.N.Y. 1978); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444, at 5049; and *Palmer v. Rogers*, 10 E.P.D. ¶ 10499, at 6131 (D.D.C. 1975) ("defendant's contention that plaintiff should not be compensated for hours devoted to the non-Title VII back pay action improperly attempts to dissect a unified case; all counts depended on a common nucleus of operative facts.").

Plaintiffs submit that counsel's action in the instant case met all of the various judicial standards for awarding attorneys' fees on matters where plaintiffs were unsuccessful. The non-Title VII aspects of this case certainly advanced plaintiffs' interests in that they presented alternative theories to the Title VII action; counsel's time was reasonably expended pursuing the ultimate result finally achieved; non-Title VII claims were not brought frivolously or in bad faith; and all claims arose from a common nucleus of operative facts. In short, it would be palpably unfair for this Court to deny plaintiffs attorneys' fees for all hours spent by counsel in matters relating in any way to the instant action (including this appeal). This is particularly so in view of this Court's own statement that "the prohibition against sex-differentiated employee contributions represent[ed] a marked departure from past practice." 435 U.S. at 722. However sure plaintiffs were of their Title VII arguments, they could not be sure that the courts would find the claims as convincing.

CONCLUSION.

The question presented is whether the district court abused its discretion in its award of attorneys' fees to plaintiffs. Having prevailed on the merits and having obtained significant declaratory and injunctive relief in the original *Manhart* litigation, there can be no doubt that plaintiffs were the prevailing parties, especially in light of the governing case law.

Defendants have shown no "special circumstances" warranting a denial of attorneys' fees. To the contrary, the facts of this case are thoroughly consistent with the statutory objectives behind an award of fees: to encourage the victims of unlawful discrimination to "take on the mantle of the sovereign"[6] and assume the role of private attorneys gen-

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[6]*Clark v. Am. Marine Corp.*, 320 F.Supp. at 710.

eral. Such encouragement is essential to the continued private enforcement of our civil rights laws.

Lastly, plaintiffs submit that there has been no showing of abuse of discretion by the district court in determining the amount of attorneys' fees to be awarded. The district court clearly took the relevant and judicially approved factors into account in reaching its determination as to a "reasonable" fee. The fee adequately and reasonably compensates plaintiffs' counsel, and is neither unfair to the defendants nor beyond the scope of the governing attorneys' fees statute.

For all of the foregoing reasons, plaintiffs respectfully submit that this Honorable Court should deny defendants' petition for writ of certiorari, and allow the court of appeals' affirmance of the district court decision to stand.

Dated: February 25, 1982.

Respectfully submitted,

ROBERT M. DOHRMANN, ESQ.,
MICHAEL R. FEINBERG, ESQ.,
SCHWARTZ, STEINSAPIR, DOHRMANN,
KREPACK, SOMMERS & EDELSTEIN,
By ROBERT M. DOHRMANN,
Attorneys for Plaintiffs-Respondents.

APPENDIX A.

Order.

United States Court of Appeals for the Ninth Circuit.

Marie Manhart, et al., Plaintiffs-Appellees, vs. City of Los Angeles, Department of Water and Power, a body corporate and politic, et al., Defendants-Appellants. Nos. 75-2729, 75-2807, 75-2905.

Filed: July 27, 1978.

Before: CHAMBERS, DUNIWAY and KILKENNY, Circuit Judges.

In this case, the plaintiffs have won a victory, in that they established the rule that they sought in a case of first impression. They have been denied a monetary recovery, not because the rule that they have established would not have entitled them to the recovery in the ordinary case, but only because, the matter being one of first impression, the Supreme Court felt that it would be better not to apply the rule retroactively. Under these circumstances, we conclude that the plaintiffs should recover their costs and that costs should not be awarded to the defendants. Otherwise, the plaintiffs' victory would have been illusory, in that they would have established a rule of law for which they contended and as their reward found themselves subjected to a liability for costs. The defendants, on the other hand, have been relieved of a substantial liability and should not, we think, be able to impost costs upon the plaintiffs in addition.

The objections of the defendants-appellants and cross-appellees to the cost bill of the plaintiffs-appellees and cross-appellants are overruled and costs on appeal are awarded to plaintiffs, in accordance with their amended cost bill, in the sum of $1,480.28. No costs are awarded to the defendants.

Petitioner's Reply Brief

Supreme Court, U.S.
FILED
MAR 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1399

IN THE

Supreme Court of the United States

October Term, 1981

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

PETITIONERS' REPLY BRIEF.

IRA REINER, City Attorney,
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power,
DAVID J. OLIPHANT, Deputy City Attorney,
By DAVID J. OLIPHANT,
Deputy City Attorney,
111 North Hope Street, P.O. Box 111,
Los Angeles, Calif. 90051,
(213) 481-6378,

Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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No. 81-1399

IN THE

Supreme Court of the United States

October Term, 1981

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD, LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

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MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

PETITIONERS' REPLY BRIEF.

POINT ONE.

TOTALITY OF CIRCUMSTANCES MAKES IT CLEAR THAT THIS IS A CASE FOR DENIAL OF ATTORNEYS' FEES.

A. Charge of Discrimination Against Males Had Solid Basis in Fact.

Respondents contend that the "no-win" position in which your petitioners found themselves throughout this lawsuit is irrelevant as to a finding of "special circumstances." The respondents' sole interest was in women's benefits. On the other hand, your petitioners represented a trust with fiduciary responsibilities to *both* male and female members. Clearly, any changes in contribution and benefit structure affect both. It is hardly public policy or the will of Congress for pension trustees to abandon their fiduciary obligations and favor the members of one sex over another merely because that sex was the first to file a lawsuit. And, under the facts as they existed at the beginning of this lawsuit, the 1972 males' complaint of discrimination was equally as valid as the females' complaint.

It has been very clear from the inception of this lawsuit through to the ultimate determinative opinion of this Honorable Court in 1978, that this case turned on balancing the interests of women individually against men as a class under Title VII of the Civil Rights Act.[1]

---

[1]While Section 703(a)(1) (42 U.S.C. §2000e-5a(1)) makes it unlawful to discriminate against any *individual* in compensation in employment because of sex, Section 702(a)(2) (42 U.S.C. §200Ce-5a(2)) makes it unlawful to *classify employees* so as to deprive them of equal opportunity or adversely affect their status because of sex. The potential for adverse effect against the class of men was discussed by this Court. *City of Los Angeles, Department of Water and Power, et al. v. Marie Manhart, et al.*, 435 U.S. 702, 710 and 720. (Hereinafter the various references to this case will be cited as "*Manhart*", followed by the appropriate volume and page citation.) See also footnote 3.

As previously noted, in the Petition, subsidizing the female longer life expectancy by either increased costs to the males or increased pay-out for females by the employer, clearly has disparate impact on male employees as a class.

That the males' complaint had its basis in solid fact is evident from the example (comparing a male and female employee at age 30, their contributions and their expected benefits upon retirement at age 65) which was included in the Department's opening Supreme Court brief filed in 1977, a copy of the pertinent pages of which is attached hereto as Appendix A.

It can readily be seen in Appendix A that the Department's 110% matching contributions together with the additional funding necessary for the formula benefit resulted in a much greater Department contribution for females than for males. Thus, in the example, over their respective working lives, the Department would pay out $1,955 more for the female than the male. The female employee on the other hand would pay out only $674 more for her pension than the male.

If the contributions paid out by the Department on behalf of each employee are considered salary, then on a monthly basis females received more salary than males. When the additional formula benefit funding is taken into account, under the example the Department would contribute 60% of the woman's pension but only 56% of the man's. Thus, a male claimant could well contend that the *male* employees contributed more towards their pension than the females, and that the females received a larger pension.

In the present case, this Court recognized that if the men and women were each given equal salary and permitted to buy their own retirement benefits on the open market, it would not violate Title VII even though men could buy

larger periodic benefits than women (*Manhart*, 435 U.S. 702, 717). In contrast, had the Department paid its unequal contributions as salary, the women would have been able to purchase periodic pension benefits identical to or greater than that of the men. Yet, this Court would have held that the higher salary paid to the women discriminated against the men, in violation of both the Equal Pay Act (29 U.S.C. §206(d)) and Title VII.

We do not wish to belabor this point, but it is easy with the benefit of this Court's opinion and hindsight to deprecate the complaint of the males. It was very plainly not so easy to take that approach originally when faced with uncharted waters and this Court's judicial notice of women's longevity (*Reed v. Reed*, 404 U.S. 71, 75 (1971)). (See *Manhart* [*re*: pension administrators and male employees shouldering more than their "actuarial share" of the pension burden] 435 U.S. 702, 720).

B. Totality of Circumstances That Points to the Existence of Special Circumstances.

Counsel for the individual plaintiffs argues that somehow, your petitioners could have conceded the legality of the plaintiffs' position and the lower court's ruling relative to Title VII of the Civil Rights Act, and merely litigated the propriety of the back pay award. This argument is specious.

Your petitioners' challenge was a two-tier process. If this Court found there was no liability and no violation of Title VII of the Civil Rights Act, then clearly, there would have been no duty to provide back pay. On the other hand, even if it found a violation, a back pay award might still be improper because under the facts it was inequitable, as this Court in fact determined. Thus, your petitioners properly took the two-tier approach to litigating the back pay issue contending: (1) there was no violation and (2) even if there

was a violation, there was no duty to make back pay. For both parties, the real issue was back pay. The issuance of the injunction, because of the change in the Plan and State law, was moot. See *Rosen v. Electric and Gas Co.*, 409 F. 2d 775, 781 (3rd Cir. 1969).

Plaintiffs' mechanical approach is that despite the equitable nature of Title VII of the Civil Rights Act, a court must always award attorneys' fees to the plaintiff, if he is in any sense a "winner". However, fees in Title VII cases, unlike anti-trust cases, are not mandatory under the statute but discretionary. The Court "may allow the prevailing party" a reasonable attorney's fee (42 U.S.C. §2000e-5(k)). Thus, this Court has held that fees will be awarded to the prevailing party *only* in the absence of special circumstances which would make such award unjust. (*Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)).

The cases cited by the Union where fees were granted over claims of special circumstances were cases where essentially, the defendants' *sole* support for claiming special circumstances was the claim of good faith. See for example, *Miller v. Amusement Enterprises, Inc.*, 426 F. 2d 534 (5th Cir. 1970). However, the following items make it clear, assuming *arguendo* plaintiffs can qualify as prevailing parties, that special circumstances *were* present in this case, beyond just good faith.

1. Defendants were faced with the alternative of discriminating against males or females, as a matter of fact, with no clear law on the subject.

2. Men, as well as women, had filed discrimination complaints.

3. Defendants had a fiduciary obligation to all of the Retirement Plan members to operate in the best interests of the trust and its members.

4. The Federal Government was in disagreement within its own agencies as to the correct law, with the agency responsible for administering the Equal Pay Act apparently supporting the position of your petitioners. (*Manhart*, 435 U.S. 702, 720, fn. 37.)

5. Defendants complied with state law as soon as that was clearly expressed in Government Code Section 7500, as compared to the lack of similar specificity in Title VII.

6. The lower courts ordered back pay which order this Honorable Court reversed. Had back pay not been awarded there would have been no purpose in your petitioners proceeding further, and petitioners would not have proceeded, to seek and obtain a review from this court.

POINT TWO.

THE NEED FOR FINDINGS IS IMPLICIT IN A TITLE VII ATTORNEYS' FEE AWARD.

Counsel cited *Lea v. Cone Mills*, 467 F. 2d 277, 278 (4th Cir. 1972) for the proposition that findings under Rule 52(a) FRCP are unnecessary under Title VII cases to support attorney's fees. It is significant that in *Lea v. Cone Mills*, the case could not be returned to the trial judge for findings, he had died; and, no findings had been requested, anyway. In the dissent, the need for findings was well stated.

Other courts and a respected treatise have determined that where there is a need for *factual* determinations Rule 52(a) should require findings.

"One commentator has argued that it would be more consistent with the purpose of Rule 52(a) (and with the intent of the Advisory Committee on Rules, which drafted the final sentence of the Rule) to read the Rule as a whole to require findings of fact whenever a decision rests on factual determinations. 5A J. Moore, *Moore's Federal Practice* §52.08 (1980); [*Horizons Titanium Corp. v. Nor-*

ton Co., 290 F. 2d 421, 424 (1st Cir. 1961)]." *Williamson v. Tucker*, 645 F. 2d 404, 410 (5th Cir. 1981). See *Williamson, supra*, p. 411 fn. 1.

If this had been a trial on the merits in a quasi contractual suit for attorney's fees, findings would be required. *Featherstone v. Barash*, 345 F. 2d 246 (10th Cir. 1965). It is illogical to hold that an award of attorneys' fees under Title VII does not require findings. The same questions are generally involved, *e.g.* reasonable time spent, reasonable rates and time compensable; and often the amounts involved are greater under Title VII.

Moreover, the Ninth Circuit has previously held that Title VII cases *do* require findings. *Fountila v. Carter*, 571 F. 2d 487, 496 (9th Cir. 1978); *Kerr v. Screen Extras Guild*, 526 F. 2d 67, 69 (9th Cir. 1975).

The Court of Appeals and respondents took the position that the brief recital of the District Court as to the five factors it considered in awarding fees, without a statement as to *what* the Court found relative to those factors, was enough to pass for findings. But, a statement by the trial court that it has considered certain factors without factual findings is nothing but a legal fiction.

POINT THREE.

THE AMOUNT AWARDED WAS UNREASONABLE AND EXCESSIVE.

Assuming, *arguendo*, fees may be awarded,[2] the amount of fees is addressed to the court's discretion. *Kerr v. Screen Extras Guild Inc.*, 526 F. 2d 67, 69 (9th Cir. 1975). How-

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[2]Counsel rely on the Court of Appeals ruling on costs under Rule 39 of the Federal Rules of Appellate Procedure as confirmation that they are entitled to fees. But rulings on costs are mandatory not discretionary and involve quite different considerations from Title VII fee awards. See for example *United States Steel Corp. v. United States*, 519 F. 2d 359 (3rd Cir. 1975).

ever, the exercise of that discretion is subject to certain standards to avoid arbitrariness. *Johnson v. Georgia Highways Inc.*, 488 F. 2d 714, 717 (5th Cir. 1974) and *Kerr v. Screen Extras Guild Inc.*, *supra*, pp. 69-70. Applied properly such standards are fair to both plaintiff and defendant.

The present case, contrary to both the *Johnson* and *Kerr* cases, holds that it is sufficient to merely pay lip service by simply listing the factors considered by the Court without stating what the Court found as to those factors. Hence, there is no way to ascertain whether the court did in fact consider such factors. When, as here, the record contains three potential variables, *i.e.*, number of hours, hourly rate and multiplier, each of which can be adjusted up or down at the court's discretion over a wide range and still arrive at the same total, without findings only the trial judge knows how he determined such factors.

Without findings as to how a court calculated the fee, logic and reason in determining amounts are abandoned in favor of arbitrariness.

As an example, despite the fact that counsel for the individual plaintiffs knew from the outset that she would look to the court for fees, she kept no records from which her actual time spent on the case could be confirmed. She asked a fee of $30,292.50 (including a multiplier) and was awarded $30,000. No reason was stated as to why that amount was given as opposed to any other or how it was determined.[3]

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[3]Such counsel's lack of familiarity in any depth with this case was borne out by her statement that the Department's Petition was the first time of which her "answering respondents are aware" that the "Retirement Fund was likewise faced with claims by male employees." A major factor throughout this litigation has been the potential for liability to males. This court as noted, discussed such liability in its opinion (*Manhart*, 435 U.S. 702, 720 fn. 38). The males' EEOC complaint was discussed in oral argument before the Supreme Court (Transcript of Oral Argument, p. 16), was included in the Supreme Court Appendix (*Manhart* Docket No. 76-1810) at pages 78-81, was included in the prior Court of Appeal Clerk's Transcript (*Manhart*, 9th Cir. C.A. No. 75-2729) at pages 302-305, and was included as Exhibit A to Points and Authorities in Opposition to Preliminary Injunction in the initial motion which formed the basis of the District Court opinion at 387 F. Supp. 980 (1975).

Another example of arbitrariness is both the granting of a multiplier and the amount of multiplier awarded.

No *statutory* language in Title VII or the Civil Rights Act of 1964 allows a bonus or a multiplier and *Northcross v. Board of Memphis City Schools*, 611 F. 2d 624, 638 (6th Cir. 1979) expressly holds against multipliers. Union counsel argues that a multiplier may be awarded to compensate counsel concededly for taking a case under the contingency that he may receive no fee. Yet, in this case the union counsel concededly faced no such contingency. He was paid throughout by the union. He took no risk. Nonetheless, union counsel was apparently arbitrarily granted a multiplier.

The Court of Appeals assumed that the trial court allowed both counsel *all* the hours requested at the *highest* rates asked, merely reducing the multiplier sought.[4] That assumption (which has to be speculative since the trial court may have intended allowing less hours, lower rates, and a larger multiplier), leads to a multiplier of approximately 29% for the union and 75% for the attorney for the individual plaintiffs, clearly arbitrary percentages with no apparent rhyme or reason.

Without findings, it is impossible to show just how arbitrarily the court applied the standards. An intelligent review is not possible. "An intelligent review must be based on substance not on guess." *Commercial Standards Ins. Co. v. Liberty Plan Co.*, 283 F. 2d 893, 895 (10th Cir. 1960).

Contrary to respondents' claims, this was not a complex case. It came up on summary judgment. There were no

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[4]*Manhart*, 652 F. 2d 904, 908. In discussing this point, the majority opinion states that the lower court decision recognizes that the hours "with a few exceptions" were reasonable. Petitioners are at a loss to determine how the majority divined that the trial court found "a few exceptions," or what those exceptions were.

witnesses, no depositions, no complicated facts and no conventional trial. The only complexity was one of statutory interpretation. For respondents the case ended with what was an academic exercise, only. The Department had changed its Retirement Plan because of the change in the California Government Code. The only reason that the lawsuit continued to be litigated after the change was to determine entitlement to back pay, the issue respondents lost. Union counsel's statement that the decision foreclosed petitioners from providing unequal *benefits* in the future has no relevance, since there was no evidence that petitioners had ever considered doing that. The fact is the results obtained gained nothing for these particular plaintiffs, *i.e.*, the respondents.

Hence, when just two of the factors set forth for allowing the respondents all of the fees requested, plus a multiplier, are considered, (that is to say, complexity of the case and results obtained) the fees are excessive.

The purpose for awarding attorney fees, counsel reminds us, is to encourage persons injured by discrimination to seek judicial relief and secure enforcement of the Civil Rights Act. Logically therefore, in the situation which existed in 1972, that entitlement was afforded to both females *and males*. Consequently, petitioners were firmly entrenched in a "no-win" position as a result of the philosophy behind the fees, alone.

On the other hand, there is an equal countervailing public interest in requiring public officials who are fiduciaries of a public pension trust to be encouraged to vigorously defend such trusts. The Board of Administration owed such duties to Plan members,[5] and in addition owed a duty to the public

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[5]Indeed, private pension trustees may be liable for attorneys' fees under the Employees Retirement Income Security Act for failure to defend an action of this kind. 29 U.S.C. §1132(g)(1).

not to give away public funds. *Green v. Frazier*, 253 U.S. 233, 238-239 (1919); *Veterans' Welfare Board v. Jordan*, 189 Cal. 124, 141 (1922).

Thus, the Court, we submit, must balance the duties of pension trustees to defend their trust (and in so doing take into account the interests of competing trust beneficiaries), against the need to encourage pension beneficiaries to vindicate Congressionally established rights. One way to do that is to take into account such balance in determining the amount of fees, if not denying fees altogether. That balance is what this honorable court explicitly recognized when it denied back pay.

Petitioners submit that the amount of an award of attorney's fees is only just, under the circumstances of this case, where that balancing is taken into account.

Granting a fee to a commercial law firm that is higher than the market rate of the market in which that firm operates, measured by today's rates for work performed several years before and paid for then for all hours requested with no reduction for *any* reason whether it be quality of work, nature of activity for time billed, or the simple fact that counsel did not prevail on a particular issue, upwardly adjusted with a supermultiplier, can not help but be a windfall, and therefore excessive.

Respectfully submitted,

IRA REINER, City Attorney,
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power,
DAVID J. OLIPHANT, Deputy City Attorney,
By DAVID J. OLIPHANT,
Attorneys for Petitioners.

APPENDIX A.

Statement of the Case.

This case was brought under Title VII of the Civil Rights Act as amended in 1972 (hereafter "Title VII"), claiming a violation of Section 703 of the Act (42 U.S.C. §2000e-2).

Plaintiffs are civil service employees of the City of Los Angeles Department of Water and Power and as such are members of a compulsory retirement Plan owned and managed by such City Department (hereafter referred to respectively as the "Plan" and the "Department").

The Plan provides for several kinds of pension benefits at the employee's option. The most common is a "formula pension". Such formula is a monthly payment equal to 2% of average monthly salary paid during the last year of employment times the number of years of employment. This monthly benefit is guaranteed for life. It is a vested right of the employee. Because women outlive men, the total amount paid as pension to a woman is greater than that paid to a man. (App. 86-88.)

For clarity, this Plan should be contrasted with those pension systems which pay men and women the same *total* pension benefits during their respective life spans, but pay women smaller monthly pension amounts. See, *e.g.*, *Henderson v. Oregon*, 405 F.Supp. 1275 (1975), on appeal in the Ninth Circuit.

The two systems may be analogized to loaves of bread accrued at the date of retirement. In the *Henderson* system, women receive the same size loaf as men but because the life expectancy is longer, the monthly "slices" received by a woman are smaller than those received by a man. In contrast, under the Department's Plan, women are to receive the same size "slice" of bread each month after retirement

but because they live longer they must have a longer loaf in order to pay all the "slices".

To fund the Plan, the employees and the Department contribute thereto. To fund the "longer loaf" payable to females, higher contributions are necessarily required for women than for men. Although contributions made by the women themselves were *slightly* higher than the contributions made by men, the Department also contributed *disproportionately more* for women than for men.

Further, since each employee has an absolute right to the return of all his or her contributions, plus a vested pension right, the present worth of all compensation paid to female employees is higher than the present worth of all compensation paid to male employees.[1]

The following table shows an example of the present value at age 30 of pension benefits of a male and a female; and the present value of contributions necessary to fund a formula pension for each, retirement being at age 65.

		Male	*Female*
1.	Age hire	30	30
2.	Monthly salary during career	$1.000	$1.000
3.	Monthly allowance at 65	700	700
4.	Present Value of Pension discounted at 5½% interest and 1951 GA Mortality Table:	9.257	11.886
5.	Monthly employee contribution to Plan	22.20	25.49
		(× 1.1484 =	
6.	Department's 110% monthly matching contribution	24.42	28.04

[1]Established state law is that all pensions have present value and City pensions are vested rights. *In re Marriage of Brown*, 15 Cal.3d 838, 126 Cal.Rptr. 633 (1976); *Abbott v. City of San Diego*, 165 Cal.App.2d 511, 517, 332 P.2d 324 (1958).

7. Present value (at age 30) of contributions to fund above pension at 5½% and 1951 table:		
a) Member Contribution	4,069	4,743
b) Department's 110% matching	4,476	5,217
c) Additional Department contribution	712	1,926
d) Total Department contribution	5,188	7,143

The contributions by the Department for a woman employee were always greater than for a corresponding man. The amount of compensation for a woman was always greater than for a corresponding man.